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Supreme Court of the United States

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY, PETITIONER,

vs.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION

No. 556

FEDERAL POWER COMMISSION, PETITIONER,

vs.

MOBILE GAS SERVICE CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CASE No. 436 PETITION FOR CERTIORARI FILED NOV. 5, 1954

CASE No. 556 PETITION FOR CERTIORARI FILED JAN. 20, 1955

CERTIORARI GRANTED FEB. 28, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

[fol. 3] **Appendix to Petitioner's Brief**

(Filed April 14, 1954)

BEFORE THE FEDERAL POWER COMMISSION

JEROME K. KUYKENDALL, *Chairman*; CLAUDE L. DRAPER, NELSON LEE SMITH and SEABORN L. DIGBY, Commissioners.

Docket No. G-2227

In the Matter of MOBILE GAS SERVICE CORPORATION

ORDER PERMITTING INTERVENTION, DENYING RELIEF REQUESTED, DISMISSING PETITION, AND TERMINATING PROCEEDINGS—December 7, 1953

On June 25, 1953, United Gas Pipe Line Company (United) filed First Revised Sheet No. 40 and Second Revised Sheet No. 39 to its FPC Gas Tariff, Original Volume No. 1, in Docket No. G-2210. These revised sheets contained proposed increases in rates and charges to Mobile Gas Service Corporation (Mobile) for resale for industrial use only to the Ideal Cement Company (Ideal). United requested July 15, 1953 as the effective date of the proposed increase. However, by order issued July 10, 1953, the Commission denied the waiver of the thirty-day notice period provided in Section 4(d) of the Natural Gas Act, consolidated the proceeding with Dockets Nos. G-1142, G-1508, G-2019, and G-2074, and fixed July 20, 1953 as the date of hearing on the reasonableness of the proposed increased rates.

[fol. 4] On August 4, 1953, Mobile filed a petition *In the Matters of United Gas Pipe Line Company*, Docket Nos. G-1142, *et al.*, seeking modification of the July 10, 1953 order. At that date, however, Mobile was not a party to the consolidated proceedings, and on August 7, 1953 Mobile

* NOTE: Numbers in brackets refer to the original page numbers of the copy.

amended its petition for modification to make a separate filing in the proceeding designated as Docket No. G-2227.[1]

In its petition in Docket No. G-2227, Mobile requested that:

(a) The Commission amend its order of July 10, 1953 in Docket Nos. G-1142, *et al.*, to reject United's filing of its First Revised Sheet No. 40 and Second Revised Sheet No. 39, which relate to the sale to Mobile of natural gas for resale for industrial use only to Ideal.

(b) If rejection be denied, the Commission modify the order of July 10, 1953 to direct a hearing to be held solely concerning the lawfulness of the filing of United's First Revised Sheet No. 40 and Second Revised Sheet No. 39.

[2] (c) The Commission issue an order amending paragraph (D) of its order of July 10, 1953 "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein."

(d) The Commission issue an order directing United that any increased rates collected from Mobile for resale to Ideal be subject to refund after hearing and determination (i) that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 is illegal, or (ii) that such revised sheets are unjust and unreasonable.

[fol. 5] Mobile alleges in its petition that, on June 28, 1946, it had entered into an agreement with United by which United agreed to accept 80 per cent of the proceeds of Mobile's resales to Ideal up to 41,667 Mcf per billing month and 90 per cent of the proceeds of all sales in excess of 41,667 Mcf per billing month even though Mobile's resale price should amount to less than 16 cents per Mcf. This agreement was filed with the Commission as Supplement No. 10

[1] All relief requested by Mobile in Docket No. G-2227 is relief which more appropriately should have been sought in the docket in which the complaint arose, Docket No. G-2210. This is, however, not material.

to Supplement No. 7 to United's Rate Schedule FPC No. 20. On July 3, 1952, United filed a restatement of its FPC Gas Tariff, Original Volume No. 4, in which, without altering the contract provisions, United's rate to Mobile for resale to Ideal was stated to be 10.7 cents per Mcf.

In its petition Mobile claims that, in reliance upon this agreement with United, it made a 10-year contract with Ideal to supply that industrial user with natural gas at a rate of 12 cents per Mcf. United has, Mobile alleges, by its filing on June 24, 1953, in which it proposed to increase the rate to Mobile to 14.5 cents per Mcf unilaterally abrogated the United-Mobile contract. And, Mobile further alleges, its contract with Ideal cannot be altered.

On September 14, 1953, United filed a petition to intervene and answer in Docket No. G-2227. Thereafter, on September 29, 1953, Mobile filed a reply to United's petition to intervene and answer.

Turning first to Mobile's request that United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 be rejected, it is apparent that such relief must be denied. For clearly, Section 4(e) contemplates the filing of rate increases for sales for resale for industrial use only, otherwise the proviso prohibiting the suspension of such rate filings would be purposeless. And since United's filing of [fol. 6] its First Revised Sheet No. 40 and Second Revised Sheet No. 39 was made in conformity with the requirements of Section 4 of the Act and Part 154 of the Commission's Regulations thereunder [8 CFR, Part 154], it is, therefore, not subject to rejection. Indeed, a natural gas company may initiate a rate increase only pursuant to the provisions of Section 4.

In regard to Mobile's request that the "unreasonableness" of United's prior rate to Mobile should be determined in a separate hearing on this issue alone, it should be noted at this juncture that United's entire rate structure subject to the Commission's jurisdiction is presently under investigation and [3] a hearing has been commenced thereon in Docket Nos. G-1142, *et al.*, (the consolidated proceedings). No good reason appears why the issues in Docket No. G-2210 should be separated for hearing. In fact, the contrary appears, for as the Commission stated

in its order consolidating Docket No. G-2210 with Docket Nos. G-1142, *et al.*:

> "The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capital, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Docket Nos. G-1142, G-1508, G-2019, and G-2074."

Further practical considerations militate against separation of one of the common issues involved in consolidated Docket Nos. G-1142, *et al.*, for hearing in Docket No. G-2227. For, United has, pursuant to Commission order of July 10, 1953, already presented its direct case in support of its filing in Docket No. G-2210, including the rates to Mobile for resale to Ideal. It is obviously not in the public [fol. 7] interest for the Commission to hear the issues pertaining to the rates involved in United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 separately when issues common to all rates filed by United in Docket No. G-2210 impelled the Commission to consolidate the issues in one docket and further to consolidate that docket with others.[2]

As for Mobile's request that paragraph (D) of the order issued July 10, 1953, in Docket Nos. G-1142, *et al.*, be amended "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein," no amendment thereof is necessary. By paragraph (D) of said order the Commission merely refused to waive the 30-day notice period provided in Section 4(d) of the Act.

As clearly appears from paragraph (D) of said order and the full context of the order in which the Commission

---

[2] By paragraph (D) of its order issued July 10, 1953 in Docket Nos. G-1142, *et al.*, the Commission ordered: "Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953."

found that the filed rates may be unjust, unreasonable, or otherwise unlawful and ordered a hearing concerning the lawfulness of those filed rates, no approval of the rate was involved. Also, as Section 154.23 of the Commission's Regulations under the Act [18 CFR 154.23] provides:

> "The acceptance for filing of any tariff, contract or part thereof is not to be considered as approval by the Commission."

Mobile also requests in its petition in Docket No. G-2227 that rates collected by United under First Revised Sheet No. 40 and Second Revised Sheet No. 39 filed in Docket No. G-2210 be collected subject to refund. But, clearly, [fol. 8] [4] the power to require refunds under Section 4(e) of the Act applies only to rates which are subject to suspension and which have been suspended. An interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates, obviously a course of action which the Commission cannot take.

Upon consideration of all the facts and questions of law presented by Mobile and United in this docket, the Commission further finds:

(1) Participation of United in this proceeding may be in the public interest.

(2) It is appropriate and in the public interest that Mobile's petition in Docket No. G-2227 be dismissed, and the proceeding terminated.

The Commission orders:

(A) United be and the same is hereby permitted to become an intervener in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, That the participation of United shall be limited to matters affecting asserted rights and interests specifically set forth in the petition for leave to intervene; and *Provided, further*, That the admission of United shall not be construed as recognition by the Commission that it might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The separate requests of Mobile, more specifically set forth in its petition filed on August 4, 1953, as supplemented on August 7, 1953, in this proceeding and as summarized in the third paragraph [fol. 9] of the narrative part of this order, be and they are hereby denied.

(D) [sic] The petition of Mobile be and it is hereby dismissed and this proceeding be and it is hereby terminated.

By the Commission.

Leon M. Fuquay, Secretary.

Adopted: December 2, 1953

Issued: December 7, 1953

Revised First Page

BEFORE THE

FEDERAL POWER COMMISSION

WASHINGTON, D. C.

In the Matters of UNITED GAS PIPE LINE COMPANY

[fol. 10] MOBILE'S PETITION AS REVISED TO HAVE COMMISSION REJECT UNITED'S FILING*

PETITION BY MOBILE GAS SERVICE CORPORATION (A) TO HAVE THE COMMISSION MODIFY AND AMEND ITS ORDER OF JULY 10, 1953 IN THE PROCEEDING IN DOCKET NO. G-2210 SO AS TO REJECT THE FILING BY UNITED GAS PIPE LINE COMPANY OF ITS FIRST REVISED SHEET NO. 40 AND SECOND REVISED SHEET NO. 39 TO ITS FPC GAS TARIFF, ORIGINAL VOLUME NO. 1, IN SO FAR AS SAID SHEETS INCREASED THE RATES FOR SALES TO MOBILE FOR RESALE TO IDEAL CEMENT COMPANY; AND (B) IF SUCH RELIEF BE DENIED, TO MODIFY AND AMEND SAID ORDER TO DIRECT THAT A HEARING BE HELD AS TO THE LAWFULNESS OF THE FILING OF SAID REVISED SHEETS; AND (C) TO MODIFY AND AMEND SAID ORDER SO AS TO ELIMINATE ANY STATEMENT OF APPROVAL OF SAID REVISED SHEETS BY THE COMMISSION; AND (D) TO ISSUE AN ORDER DIRECTING THAT ANY INCREASED RATES COLLECTED BY UNITED FROM MOBILE PURSUANT TO SAID REVISED SHEETS SHALL BE SUBJECT TO REFUND

Mobile Gas Service Corporation (herein called "Mobile"), herewith respectfully petitions the Federal Power [fol. 11] Commission, pursuant to the provisions of the Natural Gas Act and particularly Sections 5 (a) and 16 thereof and pursuant to the Rules of Practice and Procedure, Section 1.7 thereof, and respectfully requests (A) that the Commission modify and amend its order of July 10, 1953, in the matter of United Gas Pipe Line Company, Docket No.

*This document constitutes Mobile's petition as originally filed, but with the revisions which were made by Mobile's amending petition filed August 7, 1953. That amending petition is reprinted, *infra*, as are the original pages of this petition which it revised.

G-2210, so as to reject the [2] First Revised Sheet No. 40 and Second Revised Sheet No. 39 to FPC Gas Tariff, Original Volume No. 1, of United Gas Pipe Line Company (herein called "United") in so far as said Sheets apply to sales to Mobile for resale to Ideal Cement Company (herein called "Ideal") on the grounds that the said Revised Sheets cannot properly be filed under Section 4 of the Natural Gas Act because said Revised Sheets seek to effect a unilateral increase in existing rates for natural gas fixed by a firm contract between United and Mobile, which contract rates cannot be changed in the absence of a prior determination, after proper hearing, that the said existing contract rates are unreasonable as being against the public interest; and (B) that if the foregoing relief be denied the said order of the Commission issued July 10, 1953 be amended and modified to provide solely that a hearing be held as to the lawfulness of the filing by United of said Revised Sheets Nos. 39 and 40 in the absence of a prior investigation and determination of the unreasonableness of the existing contract, and (C) that the Commission issue forthwith an order substituting a revised paragraph (D) for existing paragraph (D) of its order issued July 10, 1953 so that it will be clear that the Order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased [fol. 12] rate specified therein, and (D) that the Commission forthwith issue an order directing that any increased rates which United may seek to collect from Mobile for resales to Ideal shall be collected subject to refund after a hearing and (i) a determination as to the illegality of United's filing of said Revised Sheets Nos. 39 and 40 or (ii) a determination that said Revised Sheets are unjust and unreasonable.

[3] In support thereof, Mobile alleges as follows:

1. Mobile is a corporation organized and existing as a public utility under the laws of the State of Alabama. It engages in the business of purchasing, distributing and selling natural gas at retail in the City of Mobile, Alabama and in the surrounding communities and area.

2. The names and addresses of all persons upon whom it is requested that copies of any papers, notices, motions,

orders or other documents in this proceeding should be served are as follows:

Maurice White, President
Mobile Gas Service Corporation
182 St. Francis Street
Mobile, Alabama

Sam M. Johnston, Attorney
P. O. Box 550
Mobile 4, Alabama

Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, N. Y.

3. Mobile purchases its entire supply of natural gas from United Gas Pipe Line Company, on information and belief a Delaware corporation. Mobile's purchases from United are made pursuant to a contract entered into be- [fol. 13] tween Mobile and United Gas Public Service Company, a predecessor to United, on or about January 1, 1936 and as modified by subsequent agreements between Mobile and United entered into on or about October 17, 1941 and July 30, 1946, respectively. These contracts were filed with this Commission as United's Gas Rate Schedule FPC No. 20 and Supplements Nos. 7 and 9 thereto, respectively and to which reference is hereby made and which shall be deemed incorporated herein by reference.

[4] 4. Pursuant to the terms of the 1936 contract, as modified by the contracts entered into on October 17, 1941 and July 30, 1946, it was agreed that United should be paid for gas sold to Mobile for resale to large industrial customers at percentages of the proceeds received by Mobile for such resales, but that in any event United should receive not less than 16 cents per MCF of gas sold to such industrial customers unless United consented in writing to a lesser amount.

5. On or about June 28, 1946 Mobile entered into a contract with Ideal Cement Company (hereinafter called "Ideal") under which Mobile agreed to supply Ideal's natural gas requirements up to not exceeding 8,000 MCF per day for a period of ten years, at the option of Ideal, at either the so called Rate Schedule "B" or the so-called

Rate Schedule SR-M #1, both of which Rate Schedules were set forth in the said contract. Ideal elected Rate Schedule SR-M #1.

6. Mobile advised United that Mobile was entering into the aforesaid contract with Ideal for a period of ten years and of the alternative rates provided therein to be charged Ideal, and requested United to consent and agree to accept [fol. 14] the percentages of the proceeds of Mobile's sales of natural gas to Ideal provided in the supplemental agreement between United and Mobile of July 30, 1946, namely 80% of the proceeds of sales up to 41,667 MCF per billing month and 90% of the proceeds of all sales in Excess of 41,667 MCF per billing month, even though such percentages resulted in the payment to United of less than 16 cents per MCF for natural gas sold by it to Mobile for resale to Ideal. United consented and agreed to the aforesaid rates to be charged Ideal by Mobile and agreed to accept

Revised fifth page

[5] said percentages of Mobile's proceeds of sales of natural gas to Ideal. Such consent and agreement by United was filed with the Federal Power Commission as Supplement No. 10 to United's Rate Schedule FPC No. 20, to which reference is hereby made and which shall be deemed incorporated herein by reference. Mobile entered into said contract with Ideal of June 28, 1946 in reliance upon the aforesaid consent and agreement by United.

7. Without objection of United or Mobile, Ideal has been using natural gas in quantities in excess of 8,000 MCF per single day of twenty four hours, the maximum amount which Mobile is required under its said contract with Ideal to deliver to Ideal in any such period of time, and Ideal has paid therefore at the SR-M #1 rate.

8. On or about May 29, 1952, United filed with the Federal Power Commission a restatement of its FPC Gas Tariff, as Original Volume No. 1. Among other things, said tariff included Rate Schedule Ind-3J. This schedule, which was comprised of Original Sheets No. 43 and No. 44 of said Original Volume No. 1, was for sales to Mobile [fol. 15] for resale to Ideal, and specified that the rate for such sales was 10.7 per MCF for all natural gas sold by

United to Mobile for resale to Ideal. Mobile was advised by United that the filing of this rate schedule carried out only a restatement of United's existing contract rate. As a practical matter, the rate specified in the new tariff was virtually identical with that which United had contracted to charge Mobile for gas sold to Mobile for resale to Ideal.

9. On or about June 24, 1953 United filed with this Commission various schedules of proposed increases in its rates and charges for certain [6] town-border sales, which schedules included Second Revised Sheet No. 39 and First Revised Sheet No. 40 to United's FPC Gas Tariff, Original Volume No. 1. These sheets constituted a proposed increase in the rates and charges made to Mobile for gas sold to it for resale to large industrial customers including Mobile's sales to Ideal. The rate specified in the said Revised Sheets is 14.5¢ per MCF for all gas delivered, representing an increase in the rate of Mobile of 3.8 cents, so that Mobile now is asked to pay more to United for gas than the price at which it sells that gas to Ideal.

10. On July 10, 1953 the Commission issued an order in the proceeding in Docket No. G-2210 directing that a hearing be held as to the lawfulness, among other proposed rate increases, of the said Revised Sheets Nos. 39 and 40 affecting the service to Mobile for Ideal. This the Commission had a right to do. However, the Commission went further, and in said order provided in part as follows:

[fol. 16] "(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953." (Underlining supplied.)

11. On or about July 16, 1953, Mobile submitted for filing in the above entitled consolidated proceeding its petition for intervention.

I

The Commission Should Reject the Filing by United of Revised Sheets Nos. 39 and 40 In So Far As They Relate to Mobile's Sales to Ideal.

United's action in filing its proposed increase in its rates to Mobile for gas sold Mobile for resale to Ideal is a

unilateral effort [7] on United's part to abrogate or modify its contract with Mobile.

Mobile's contract with Ideal to supply the latter with this gas at 12 cents per MCF for the ten year term of the contract was entered into with the knowledge and consent of United and in reliance upon United's express agreement, given pursuant to its contract with Mobile, to accept the aforesaid percentages of the proceeds of Mobile's resales to Ideal, even though such percentages amounted to less than 16 cents per MCF.

It is Mobile's position that United's agreement to accept 80% and 90% of the 12 cents per MCF rate specified in Mobile's contract with Ideal, cannot be modified or abrogated by United through any unilateral action taken by it pursuant to Section 4 of the Natural Gas Act. Mobile contends that in the absence of its agreement to an in- [fol. 17] crease in the rates at which United agreed to supply gas for resale to Ideal, the only proper procedure whereby United and the Commission may increase such rates is after a hearing and a determination that the said existing contract between United and Mobile is unjust and unreasonable.

The impropriety in United's unilateral attempt to abrogate its agreement with Mobile is particularly apparent here where, by reason of the proviso contained in Section 4 (e) of the Natural Gas Act, the increased rates sought by United could not be suspended and have therefore been permitted to become effective without even affording Mobile an opportunity to have their justness and reasonableness determined by hearing before this Commission. Rather, Mobile has been deprived of its rights and of its property without either opportunity to be heard as to the reasonableness of the increased rates or without any obligation being placed upon United to demonstrate that the existing rates fixed by its agreement with Mobile are unreasonable.

[8] It is respectfully submitted that the correctness of Mobile's position is supported by the decision of the Supreme Court of the United States in *Wichita Railroad & Light Co. v. The Public Utilities Commission of the State of Kansas*, 260 U.S. 48 and by the decision in *Attleboro*

Steam & Electric Co. v. Narragansett Electric Lighting Co., 295 Fed. 895, and that United's existing agreement with Mobile with respect to resales to Ideal can only be altered after a proper hearing and determination that it is unreasonable and is injurious to the public interest.

Moreover, Mobile submits that even if the Commission [fol. 18] disagrees with the foregoing contentions, it should nevertheless, in the exercise of its discretion, refuse to permit its procedures to be utilized by United for the unilateral abrogation of a firm and binding agreement, entered into in good faith and at arms length, without first requiring that United demonstrate that its agreement to serve Mobile for resale to Ideal at 10.7 cents per MCF is unjust and unreasonable because it is injurious to the public interest, and Mobile respectfully urges that such an exercise of the Commission's discretion is particularly appropriate in the present proceeding where the suspension provisions of Section 4 (e) are not available.

II

The Commission Should Forthwith Issue an Order Substituting a Revised Paragraph (D) for Existing Paragraph (D) of its Order Issued July 10, 1953.

Mobile maintains that United cannot unilaterally abrogate or modify its agreement with Mobile with respect to the rates for natural gas sold by United to Mobile for resale to Ideal. Filing a proposed revision of the applicable rate schedule purports to do just this. [9] Accordingly, the Commission should not in its Order of July 10, 1953 have stated that such filing was permitted to become effective July 25, 1953.

In the Commission's opinion accompanying the said order of July 10, 1953 the Commission stated in part:

> "From the data filed by United the increased rates and charges provided in said proposed First Revised Sheets Nos. * * * 40 *, * * *, Second Revised Sheets Nos. * * * 39 as tendered for filing [fol. 19] on June 24, 1953, have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful."

In its said order the Commission found it necessary and proper in the public interest that United's proposed increased rates be suspended and ordered that a hearing as to the lawfulness of all of such proposed increased rates and charges be had. However, by reason of the proviso contained in Section 4(e) of the Gas Act, the Commission did not suspend Revised Sheets Nos. 39 and 40.

Mobile submits that in the light of the Commission's suspension of United's other proposed increased rates and the possibility that all of such proposed increases, including Revised Sheets Nos. 39 and 40 may be "unjust or unreasonable or otherwise unlawful", it was improper to order that such Revised Sheets be permitted to become effective. Mobile submits that paragraph (D) of such order with respect to Revised Sheets Nos. 39 and 40 cannot and should not be permitted to stand as separate affirmative approval by this Commission of said Revised Sheets, and that said paragraph (D) is not supported by the Findings.

It is Mobile's belief that the Commission intended by paragraph (D) above quoted to do no more than deny United's request that the revised sheets therein mentioned should be permitted to become effective prior to thirty days from the date of actual filing thereof. If this is the fact [10] then there was no need for the Commission to state that "the same are hereby permitted to become effective on July 25, 1953."

Mobile therefore submits that a further order should [Fol. 20] forthwith be issued by the Commission deleting from the Commission's said order of July 10, 1953 the above quoted paragraph (D) of said order and substituting in lieu thereof a paragraph (D) reading substantially as follows:

> "(D) The Commission hereby denies the request of United that First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be permitted to become effective on July 15, 1953."

The Commission's attention is directed to Sec. 154.21 of its General Rules and Regulations which provides:

> "The Effective Tariff of a natural gas company shall be the Tariff filed pursuant to the requirements

of this Part, *and permitted by the Commission to become effective. No natural gas company shall directly or indirectly demand, charge, or collect any rate for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classification, practices, rules or regulations different from those prescribed in its effective Tariff, and executed service agreements on file with the Commission, unless otherwise specifically provided by Order of the Commission.*" (Italics supplied.)

The Commission's attention is also directed to Paragraph D of the Commission Order issued July 10, 1953 which reads:

"(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 *be and the same are hereby permitted to become effective on July 25, 1953.*" (Italics supplied.)

Should the Commission not reject the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 of [fol. 21] United's FPC Gas Tariff Original Volume I, it would appear in view of the above quoted Section 154.21 of the Commission's Rules and Regulations and the above quoted Paragraph D of the Commission's Order of July 10, 1953 that United will [11] not only have the right, but be under obligation, to charge Mobile for natural gas sold Mobile for resale to Ideal at the rate of 14.5 cents per MCF, unless this Commission modifies its aforesaid Order of July 10, 1953 to eliminate therefrom its permission to United as set forth in the above quoted paragraph D to make effective July 25, 1953 First Revised Sheet No. 40 and Second Revised Sheet No. 39.

Mobile further contends that the Commission in such further order should declare and make it clear that although by virtue of the provisions in Section 4(e) of the Natural Gas Act the Commission cannot suspend rates for sales of natural gas for resale for industrial use only, that nevertheless Section 154.24 of the Commission's Rules

and Regulations provides: "Acceptance for filing of any Tariff, contract or part thereof is not to be considered as approval by the Commission", and that accordingly, the Commission does not recognize the legal right of United to charge the increased rates set forth in said First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 until the Commission has had an opportunity to hear United and any protestants and to investigate and determine the reasonableness and legality thereof; and that the Commission does not sanction the filing of revised sheets as a device to abrogate or modify the terms of existing contracts affected thereby unless and until the Commission determines that public interest requires and justifies the abrogation or modification of such contracts.

[fol. 22] III.

The Commission Should Order That United Should Save Mobile Harmless From Rates Later Determined to Be Illegal.

In the event that the Commission shall deny Mobile's request that United's filing of its Revised Sheets Nos. 39 and 40 be rejected in [12] so far as they relate to Mobile's resale to Ideal, Mobile may be subjected to irreparable damage unless the Commission affords it other relief. If the Commission refuses to reject United's filing or if having refused such rejection it orders a hearing solely as to the lawfulness of United's filing, Mobile may be obligated to pay United the increased rate set forth in said Revised Sheets for gas sold by it to Ideal pending a determination by the Commission as to the propriety of United's unilateral filing of such increased rates in spite of the existence of its firm agreement with Mobile respecting Mobile's purchases of gas for resale to Ideal.

Mobile submits that it would be placed in a clearly unjust and unfair position as a result of the possibility of its being obligated to pay United increased rates during an interim period pending determination as to the lawfulness of United's unilateral action and respectfully submits that it will suffer irreparable damages and injury if this Commission does not protect its rights. Consequently, Mobile requests that in the event the Commission refuses

to reject United's filing of Revised Sheets Nos. 39 and 40, it forthwith issue an order directing, in the event Mobile is obligated to pay United increased rates for gas purchased for resale to Ideal, such increased rates collected by United shall be subject to a refund to Mobile in the [fol. 23] event that they shall ultimately be determined to be illegal.

In the ordinary case of proposed increased rates the rate payer has the dual protection of a five months suspension of the increase and of a bond if the rates thereafter go into effect pending a Commission decision as to their lawfulness. Here Mobile is deprived of the suspension safe-guard and it is all the more appropriate, therefore, that it be afforded protection as aforesaid.

[13] Mobile respectfully submits that under Sections 16 and 20 of the Natural Gas Act the Commission has authority to afford Mobile such necessary protection, and it further submits that this protection is essential in this case where the increased rates which United may be entitled to collect from Mobile "may be unjust or unreasonable or otherwise unlawful" and where the increased rates have not been suspended.

WHEREFORE, your petitioner respectfully prays

(1) That the Commission forthwith enter an order amending and modifying its order of July 10, 1953 so as to provide that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 to United's FPC Gas Tariff, Original Volume No. 1, in so far as they apply to service to Mobile for resale to Ideal, be rejected; and further prays that, in the event the foregoing relief be denied,

(2) the Commission enter an order amending and modifying its order of July 10, 1953 to provide solely for a hearing as to the lawfulness of the filing by United of the said Revised Sheets Nos. 39 and 40; and

[fol. 24] That the Commission forthwith issue an order substituting for paragraph (D) of its order of July 10, 1953 a new paragraph (D) reading as follows:

"(D) The request of United that First Revised Sheets Nos. 32 and 40 and Second Revised Sheets

Nos. 31 and 39 be permitted to become effective on July 15, 1954 is denied."

(4) Further prays that the Commission forthwith enter an order directing that any increased rates which United may be entitled to collect from Mobile for sales to Mobile for resale to Ideal shall [14] only be collected subject to refund to Mobile in the event and to the extent that said increased rates shall be determined to be illegal; and

(5) For such other and further relief as to the Commission may seem just in the premises.

Respectfully submitted,

Winthrop, Stimson, Putnam & Roberts; Johnston, McCall & Johnston, Attorneys for petitioner Mobile Gas Service Corporation.

William C. Chanler, Arthur E. Palmer, Jr., Of Counsel.

[fol. 25] Johnston, McCall & Johnston, P. O. Box 550, Mobile, Alabama; Samuel M. Johnston, Dan T. McCall, Jr., Of Counsel.

[Verified August 3, 1953 by Dan T. McCall, Jr., attorney for Mobile.]

[Certificate of Service dated August 4, 1953 by Dan T. McCall, Jr.]

[fol. 26] BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, G-2220

In the Matters of UNITED GAS PIPE LINE COMPANY

MOBILE'S PETITION AMENDING ITS INITIAL PETITION*

PETITION BY MOBILE GAS SERVICE CORPORATION (A) TO HAVE THE COMMISSION MODIFY AND AMEND ITS ORDER OF JULY 10, 1953 IN THE PROCEEDING IN DOCKET No. G-2210 SO AS TO REJECT THE FILING BY UNITED GAS PIPE LINE COMPANY OF ITS FIRST REVISED SHEET No. 40 AND SECOND REVISED SHEET No. 39 TO ITS FPC GAS TARIFF, ORIGINAL VOLUME No. 1, IN SO FAR AS SAID SHEETS INCREASED THE RATES FOR SALES TO MOBILE FOR RESALE TO IDEAL CEMENT COMPANY; AND (B) IF SUCH RELIEF BE DENIED, TO MODIFY AND AMEND SAID ORDER TO DIRECT THAT A HEARING BE HELD AS TO THE LAWFULNESS OF THE FILING OF SAID REVISED SHEETS; AND (C) TO MODIFY AND AMEND SAID ORDER SO AS TO ELIMINATE ANY STATEMENT OF APPROVAL OF SAID REVISED SHEETS BY THE COMMISSION; AND (D) TO ISSUE AN ORDER DIRECTING THAT ANY INCREASED RATES COLLECTED BY UNITED FROM MOBILE PURSUANT TO SAID REVISED SHEETS SHALL BE SUBJECT TO REFUND

On August 4, 1953, Mobile Gas Service Corporation (herein called "Mobile") filed with the Federal Power [fols. 27-29] Commission its Petition in the above entitled proceeding captioned as aforesaid. For the reasons (1) that Mobile in its letter transmitting said Petition to the Commission for filing requested that the Commission assign a separate Docket number to said Petition and (2) that Mobile at the time of said filing had not been recognized by the Commission [2] as an intervener in the above entitled proceeding and should not have been described therein as an intervener, Mobile now desires to amend its said Petition filed on August 4, 1953 by substituting a new first page for

* This amending petition is reprinted in the form in which it was filed. The original petition, as revised, is reprinted, *supra*, and the pages of the original petition which were revised are reprinted, *infra*.

the first page of Petition to delete the docket numbers in the caption hereof in order that a separate docket number may be assigned thereto and to omit the reference to Mobile as an intervener by deleting the phrase: "intervener in the above entitled proceeding". Mobile also desires to substitute a new fifth page for page five of its said Petition filed on August 4, 1953 for the purpose of amending Section 5 of said Petition.

WHEREFORE, your Petitioner respectfully prays that the Commission will substitute for the first page and fifth page respectively of Mobile's Petition filed with this Commission on August 4, 1953 the revised first page and revised fifth page hereto annexed, and assign a separate docket number to its said Petition filed on August 4, 1953 as hereby amended.

Respectfully submitted, Mobile Gas Service Corporation, by (S.) E. M. Sampson, Assistant Secretary.

[fol. 30] BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

In the Matters of UNITED GAS PIPE LINE COMPANY,

ORIGINAL FIRST PAGE OF MOBILE'S PETITION WHICH WAS CHANGED BY MOBILE'S AMENDING PETITION

PETITION BY MOBILE GAS SERVICE CORPORATION (A) TO HAVE THE COMMISSION MODIFY AND AMEND ITS ORDER OF JULY 10, 1953 IN THE PROCEEDING IN DOCKET No. G-2210 SO AS TO REJECT THE FILING BY UNITED GAS PIPE LINE COMPANY OF ITS FIRST REVISED SHEET No. 40 AND SECOND REVISED SHEET No. 39 TO ITS FPC GAS TARIFF, ORIGINAL VOLUME No. 1, IN SO FAR AS SAID SHEETS INCREASED THE RATES FOR SALES TO MOBILE FOR RESALE TO IDEAL CEMENT COMPANY; AND (B) IF SUCH RELIEF BE DENIED, TO MODIFY AND AMEND SAID ORDER TO DIRECT THAT A HEARING BE HELD AS TO THE LAWFULNESS OF THE FILING OF SAID REVISED SHEETS; AND (C) TO MODIFY AND AMEND SAID ORDER SO AS TO ELIMINATE ANY STATEMENT OF APPROVAL OF SAID REVISED SHEETS BY THE COMMISSION; AND (D) TO ISSUE AN ORDER DIRECTING THAT ANY INCREASED RATES COLLECTED BY UNITED FROM MOBILE PURSUANT TO SAID REVISED SHEETS SHALL BE SUBJECT TO REFUND

Mobile Gas Service Corporation (herein called "Mobile"), intervenor in the above-entitled proceeding, herewith respectfully petitions the Federal Power Commission, pursuant to the provisions of the Natural Gas Act and particularly Sections 5 (a) and 16 thereof and pursuant to the Rules of Practice and Procedure, Section 1.7 thereof, and respectfully requests (A) that the Commission modify and amend its order of July 10, 1953 in Docket No. G-2210 in the above-entitled proceeding so as to reject the

[fol. 31] ORIGINAL FIFTH PAGE OF MOBILE'S PETITION WHICH WAS CHANGED BY MOBILE'S AMENDING PETITION

[5] said percentages of Mobile's proceeds of sales of natural gas to Ideal. Such consent and agreement by United was filed with the Federal Power Commission as Supple-

ment No. 10 to United's Rate Schedule FPC No. 20, to which reference is hereby made and which shall be deemed incorporated herein by reference. Mobile entered into said contract with Ideal of June 28, 1946 in reliance upon the aforesaid consent and agreement by United.

7. With the knowledge and approval of United, Mobile has been supplying natural gas to Ideal in quantities up to approximately 12,000 MCF per day all at the SR-M #1 rate, although the contract between Mobile and Ideal requires Mobile to supply Ideal's requirements up to only 8,000 MCF per day.

8. On or about May 29, 1952, United filed with the Federal Power Commission a restatement of its FPC Gas Tariff, as Original Volume No. 1. Among other things, said tariff included Rate Schedule Ind-3J. This schedule, which was comprised of Original Sheets No. 43 and No. 44 of said Original Volume No. 1, was for sales to Mobile for resale to Ideal, and specified that the rate for such sales was 10.7 cents per MCF for all natural gas sold by United to Mobile for resale to Ideal. Mobile was advised by United that the filing of this rate schedule carried out only a restatement of United's existing contract rate. As a practical matter the rate specified in the new tariff was virtually identical with that which United had contracted to charge Mobile for gas sold to Mobile for resale to Ideal.

9. On or about June 24, 1953 United filed with this Commission various schedules of proposed increases in its rates and charges for certain

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[fol. 32] BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-2227

In the Matter of MOBILE GAS SERVICE CORPORATION

UNITED'S PETITION OF INTERVENTION AND ANSWER

Petition of Intervention and Answer of United Gas Pipe Company

United Gas Pipe Line Company (United) herewith respectfully moves the Federal Power Commission (Commission) pursuant to the provisions of the Natural Gas

Act and to the Rules of Practice and Procedure of this Commission, issued pursuant thereto, for leave to intervene in this proceeding in opposition to the position of Mobile Gas Service Corporation (Mobile) and in support of the validity and binding effectiveness of the Order of this Commission heretofore issued on July 10, 1953 in Docket No. G-2210 before this Commission, permitting certain rates as set out in First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 as well as other proposed rates to become effective on July 25, 1953 pending the hearing and decision of the proceedings in said docket. United shows that it is a party in interest to the matters set out herein by Mobile and will be directly affected by the decision of the rulings of the Commission herein, and since the issues sought to be presented involve the duties and obligations of United under the Natural Gas Act to this Commission, it is entitled to appear and present [2] its position for the consideration of this Commission.

[fol. 33] I

In answer to the petition of Mobile, United alleges as follows:

(1). United is a Natural Gas Company subject to the jurisdiction of the Commission under the Natural Gas Act and the matters and issues sought to be raised herein by Mobile involve its rights, powers and duty to the Commission and the Commission's power, authority and jurisdiction of matters confided to the jurisdiction of the Commission by the Natural Gas Act.

(2) The names and addresses of all persons upon whom it is requested that copies of any papers, notices, motions, orders or other documents in this proceeding should be served are as follows:

Mr. Winston W. Brown, Assistant Secretary
United Gas Pipe Line Company
1525 Fairfield Avenue
Shreveport, Louisiana

II

On or about January 1, 1936, United Gas Public Service Company, a predecessor of United, contracted with Mobile respecting the sale of natural gas to Mobile, which contract, in Article XV, among other things, provided: "all of the obligations of the parties hereunder shall be subject to the valid orders of all governmental bodies, both Federal and State, having lawful jurisdiction in the premises". United has succeeded to the rights, powers and obligations of United Gas Public Service Company in said contract, which has from time to time been amended and supplemented by the parties, all of which have, in [3] accordance with the rules and regulations of this Commission, been filed with this Commission, and by this Commission permitted to become effective, including a supplement or amendatory agreement of date June 28, 1946, which was [fol. 34] filed with this Commission as Supplement No. 10 to Supplement No. 7 to United's Gas Rate Schedule FPC No. 20, the signature of United to the last supplement being expressly conditioned upon approval of this Commission and this Commission permitted the same to become effective.

III

In accordance with the provisions and requirements of the Rules and Regulations of this Commission, United filed on or about the 3rd day of July, 1952, its FPC Gas Tariff converting all contracts and contractual agreements for service and rates into tariffs as provided by the Rules and Regulations of the Commission, one of such contracts so converted into tariff form was the contract and all supplements and amendments thereto described in Paragraph II hereof. Said conversion tariff, together with the service agreement supporting the same, superseded all of the terms and provisions of said original contract and supplements thereto, except those provisions expressly retained as permitted by the Rules and Regulations of this Commission and thereby became the only lawful basis for service and the rates and charges to be made therefor lawfully chargeable by United to Mobile for the service and sales covered by said tariff.

IV

On or about June 24, 1953, United filed with this Commission [4] application for increase of rates and charges covering certain town border sales and certain sales for resale to large industrial consumers, which would be inclusive of the gas alleged by Mobile to be sold by it to Ideal Cement Company. This application was accepted for filing by the Commission and docketed as Docket G-2210 by the order of July 10, 1953, which, in accordance with the provisions of the Natural Gas Act, permitted the tariffs for resale for industrial use only, including that to [fol. 35] Mobile for its resale to Ideal, to become effective on July 25, 1953, "pending such hearing and decision thereon", consolidating said Docket G-2210 with Dockets G-1142, G-1508, G-2019 and G-2074, then pending and in course of hearing, and set said application for immediate hearing to begin in the Hearing Rooms of this Commission in Washington, D. C. on Monday, July 20, 1953. In accordance with the Rules and Regulations of this Commission, United gave notice to Mobile of such filing and the rates proposed and applied for and in addition thereto, Mobile was advised by the Commission, in accordance with the Commission's custom, of such filing and its comments requested; and thereafter, Mobile duly filed an application to intervene in said Docket G-2210 which has been granted by the Commission and Mobile is a party to said proceeding after due notice as required by law fully authorized and empowered to present in the record of said proceeding, any evidence, if any, which it may have touching upon the right of United in said Docket G-2210 to have said proposed rates finally established, and fully authorized and empowered to present to this Commission any evidence, if any, which it [5] may have bearing upon the issue whether such rates are just and reasonable and to be finally authorized by this Commission.

V

Instead of availing itself of its rights as an intervenor in accordance with the order of this Commission, Mobile has filed this proceeding in which it contends:

(A) That a contract for a rate for a fixed term is superior to and beyond the reach of Section 4(e) of the Natural Gas Act;

(B) That such contract presents a rate which may not be interfered with except upon a proceeding under Section 5(a);

[fol. 36] (C) That such contract prevents this Commission and United from exercising the duties and obligations granted and imposed upon them by the Natural Gas Act with respect to the provisions of Section 4 of the Natural Gas Act; and

(D) That such contract requires this Commission, contrary to the requirements of the Natural Gas Act, to reject without hearing an application lawfully filed under Section 4(e) of the Act.

VI

United shows that the positions and contentions of Mobile are without force and effect and are wholly without merit for the following [6] reasons, to-wit:

(1) No private contract may be validly made or enforced or relied upon which purports, or is contended, to deprive, restrict, impair or destroy any right or duty of a natural gas company or this Commission as required by the terms of the Natural Gas Act and any and all contractual provisions at variance therewith, are wholly void and unenforceable.

(2) Only just and reasonable rates may be charged by United in respect of service subject to the jurisdiction of this Commission, and United as a natural gas company subject to the jurisdiction of this Commission, has the duty under that Act, including Section 4(e), to propose for Commission approval or acceptance, rates or changes in rates which are just and reasonable and not discriminatory; and the Commission itself, or, under complaint of any of those persons specified in Section 5(a) of the Act, has the power

to investigate and determine the reasonableness of rates; and such powers, rights and duties of natural gas companies, their contractees, and the Commission cannot be changed, altered, restricted, or destroyed by any contract or contractual provision between the natural gas company [fol. 37] and any of its customers so that United and Mobile, as a matter of law, were not and are not now free validly to contract in derogation of any of the terms and provisions of the Natural Gas Act or the exercise of rights and duties permitted and required by that Act either upon United or this Commission.

(3) All of the provisions of the contract of January 1, 1936 and all amendments and supplements thereto, the conversion tariff [7] filed by United and the application docketed in Docket G-2210, are as to United and Mobile wholly and in all things subject to the Commission's powers and duties under the Act and any contractual provision therein which would prevent or restrict or tend to prevent or restrict the free exercise and performance of the duties and powers given to and imposed upon United as a natural gas company and this Commission as the administrator of the Act, as a matter of law, are inoperative, unenforceable and invalid.

(4) Rate making and regulation by the Commission is a legislative function under the Act and in nowise subject to any private contractual obligation and the respective rights, duties and powers under the Act including Sections 4 and 5, are in all respects superior to contractual provisions.

(5) Any contractual provision approved or merely accepted by this Commission or a rate fixed or merely accepted by this Commission are subject always to the rights and duties of United as a natural gas company and to this Commission under the Act, including Sections 4 and 5 to propose and fix just and reasonable rates. The effect of supporting or adjudging the contentions of Mobile as correct would be to annul and cancel the applicability of Section 4(e) of the Act to United, which would be against public policy, for one subject to regulation may not impair, [fol. 38] interfere with or defeat such regulation by a contractual provision which would have the effect to rescind and annul a statute or any part thereof and this result

would follow, if the [8] contract between Mobile and United prevents, as Mobile contends, United from relying upon or complying with Section 4(e). Emasculation of Section 4 by reason of a contractual provision would effectively destroy any right or power to increase a rate or charge, for Section 4 is the only method provided by the Act for increase of pending rates or charges, and Section 5(a), while giving the Commission power to determine the just and reasonable rate (or charge) * * * to be thereafter observed or enforced, expressly denies power to the Commission to increase a rate by the proviso "That the Commission shall have no power to order any increase in *any* rate * * * unless such increase is in accordance with a *new* schedule filed by such natural gas company." (Italics supplied) Thus the Act contemplates and requires that any increase of a rate can only be accomplished by a filing act of the natural gas company which necessarily is a unilateral act performable only by it under Section 4. Upon such filing, the Commission under Section 4(d) is then authorized to permit the same to become effective without hearing, or by Section 4(e) to require a hearing "concerning the lawfulness of such rate" proposed, nor is the exercise of such duties and power by the Commission conditioned by the Act upon a prior hearing or completed proceeding under Section 5(a) of the Act.

(6) A filed rate, whether fixed or merely accepted by the Commission, is the only lawful rate, and thus the rate filed in Docket G-2210 and permitted by the Commission to become effective pending hearing is the only lawful rate between United and Mobile binding equally on both.

[9] (7) The order of July 10, 1953 is a valid and binding order upon Mobile and is the only effective rate which [fol. 39] United can lawfully charge Mobile and which Mobile can lawfully pay pending the hearing upon the same in Docket G-2210 and is therefore conclusive upon Mobile and cannot be collaterally attacked by Mobile in this independent proceeding. An increase in rates having been lawfully proposed and applied for by United under the provisions of Section 4(e) could not be properly or validly rejected by the Commission as Mobile now seeks without a hearing, and, since the Act expressly forbids the Commis-

sion to suspend an application for increase of a sale of natural gas for resale for industrial use only, the Commission by adopting and issuing the order of July 10, 1953 issued the only order which it could properly and lawfully issue and one wholly and strictly in accordance with the duties and obligations imposed upon it by the provisions of the Act.

(8). Mobile's suggestion that the Commission should now attach conditions to the order of July 10, such as a condition for refunding should the Commission enter in Docket G-2210 an order which would not approve in full such proposed rates, is equally without merit and force for the following reasons:

Section 4(e) of the Act gives to the Commission the discretion to suspend the operation of certain types of rates and further provides that if the Commission in its discretion does suspend such rates, it shall have the further discretion, upon the same becoming effective prior to completion of the hearing, to require a bond upon a condition [10] of refund, whereas such powers and discretions with reference to gas sold for resale for industrial use only are expressly prohibited and denied to the Commission by the proviso of said Section

> "That the Commission shall not have authority to suspend the rate, charge, classification or service for the sale of natural gas for resale for industrial use only"

[fol. 40] so that the attaching of any such conditions to the order of July 10, 1953, in respect of such industrial rates, would be contrary to the express provisions of Section 4(e) and would constitute the exercise of powers expressly denied to the Commission. Non-suspendable rates, charges, classifications or service for the sale of natural gas for resale for industrial use only in accordance with the provisions of Section 4(e) and the intent thereof are comparable to reparations which the Commission does not have the power to grant. Unless and until the Congress should amend the Natural Gas Act and give to this Commission powers to suspend or otherwise attach conditions such as Mobile suggests to rates, charges, classifications or service

"for the sale of natural gas for resale for industrial use only", no such right exists and the Commission would be without valid power or authority to attach such conditions.

(9) Mobile's petition on its face shows, and the Commission will take judicial knowledge of the fact, that the requirements of due process have been fully complied with in that Mobile has been notified [11] as required by the Rules and Regulations of this Commission of the pendency of the matters affecting it and involved in Docket G-2210, has been permitted to intervene therein, and thus has ample opportunity to offer there such evidence, if any, which it may have bearing upon the ultimate issue to be there decided that such rates proposed by United are just and reasonable. Mobile is thus not deprived of any legal rights or property, but is vouchsafed and guaranteed the exercise by such means of all rights which it has or may claim for consideration of this Commission of its contention with respect to the decision which this Commission will make up the application in said Docket G-2210, which is still pending, the hearing being in recess.

[fol. 41] VII

By reason of all of the matters set out in the foregoing, United says that Mobile being a party to the proceedings in Docket G-2210 and thus possessed of full opportunity and right to present evidence on the issues therein, this proceeding should be denied and dismissed, or in the alternative, treated as a supplement to Mobile's intervention in said Docket G-2210 insofar as the same would permit Mobile to participate therein and offer evidence upon the issue as to the justness and reasonableness of the rates proposed to be applicable to it, but that all of its contentions herein presented constituting an attack upon the valid and subsisting order of this Commission dated July 10, 1953 and all of the issues sought to be tendered here of superiority of a claimed contractual provision to [12] the provisions and requirements of the Natural Gas Act and of the Rules and Regulations of this Commission, or for rejection or attaching of conditions to the order of July 10, 1953, should be forthwith and in all things denied, rejected and dismissed.

Wherefore, premises considered, United prays that the petition of Mobile herein be in all things denied or dismissed, or in the alternative that so much thereof as is consistent with the petition of intervention of Mobile in Docket G-2210 be considered as a supplement to the petition [fol. 42] of intervention and filed in that docket now in course of hearing to which Mobile is a party and for such other orders as the Commission may deem just and proper.

United Gas Pipe Company, Original Signed. By: Wilbert O. Crain, General Counsel.

Counsel for United Gas Pipe Line Company.

Wilbert O. Crain, General Counsel, Geo. D. Fiser, Address: United Gas Building, 1525 Fairfield Avenue, Shreveport, Louisiana. Thomas Fletcher, Address: Neils Esperson Building, Houston, Texas. Vernon Woods, C. Huffman Lewis, Address: 1525 Slattery Building, Shreveport, Louisiana.

[Verified September 11, 1953 by Wilbert O. Crain, General Counsel of United Gas Pipe Line Company.]

[Certificate of Service dated September 14, 1953 by Wilbert O. Crain.]

[fol. 43] Before the Federal Power Commission

Docket No. G-2227

In the Matter of Mobile Gas Service Corporation

Reply of Mobile Gas Service Corporation to Petition of Intervention and Answer of United Gas Pipe Line Company

Comes now Mobile Gas Service Corporation (herein called "Mobile") and herewith respectfully replies, pursuant to the provisions of the Natural Gas Act and to the Rules of Practice and Procedure of the Federal Power Commission (herein called "Commission"), including Sections 1.9(f) and 1.20(b), to the Petition of Intervention and Answer of

United Gas Pipe Line Company (herein called "United"), and in support thereof respectfully alleges the following:

I

Mobile has no Objection to United's Intervention

Mobile has no objection to the intervention of United in the above entitled proceeding.

[fol. 14] II

Special Contracts Between Utilities Are Binding as to Rates Until Such Rates Are Found to Be Unreasonable

In its Answer United sets forth its opposition to the Petition of Mobile wherein Mobile requested the Commission to reject the filing by United of its First Revised Sheets No. 40 and Second Revised Sheets No. 39 to its F. P. C. Gas Tariff, Original Volume No. 1.

[2] United has misconstrued the nature of Mobile's position. United argues that Mobile seeks to place a private contract between utilities above the provisions of the Natural Gas Act and thereby to limit the authority of the Federal Power Commission. In fact, Mobile's position is quite the contrary. As set forth in Mobile's petition heretofore, in order to obtain the business of Ideal Cement Company (herein called "Ideal"), a three-way contract was entered into in 1946 between United, Mobile and Ideal under which United agreed to supply gas to Mobile for resale to Ideal for a period of ten years at agreed special rates. Mobile recognizes the right and authority of this Commission to set aside or modify its contract with United. However, since this is a special contract between the parties it can be altered only after a finding that it is "unreasonable", not by the mere unilateral filing by United of proposed increased rates.

Moreover, Mobile maintains that in a case such as this the proper procedure for United is pursuant to Section 5(a) of the Act to obtain a determination that the existing contract is "unreasonable". Section 5(a) is designed for this very purpose. United's position is, in effect, that no contract between utilities is worthy of the name, since at any time it may be scrapped merely by filing a new set of

[fol. 45] rates under Section 4 of the Act and, if necessary, having a hearing on the reasonableness of these new rates. We submit that under this theory Section 5(a) is rendered virtually meaningless. Furthermore, it is United, not Mobile, which would limit the power of this Commission, for obviously, if no special contract between utilities is binding against the mere filing of new rates under Section 4, the Commission has no power to authorize such a contract between utilities at an agreed rate, although this might often be a most desirable and even necessary step to the efficient and continued operation of a utility.

[3] III

Section 4(e) Permits the Commission to Order United to Furnish a Bond and Mobile Will Be Irreparably Injured Unless a Bond Is Ordered in This Instance

In its Answer United maintains also that this Commission cannot order it to furnish a bond conditioned upon repayment of the increased rates which it may collect for sales to Mobile for resale to Ideal in the event it is determined that such increased rates were unlawfully instituted or are unreasonable. United bases its argument on the grounds that under the provisions of Section 4(e) of the Act this Commission is powerless to order a bond except in those cases where it is also permitted to suspend the effective date of proposed increased rates. Since the rates involved here are for resale to an industrial consumer and cannot be suspended, United says, the Commission cannot order United to post a bond for their repayment.

We submit that United misreads the language and intent of Section 4(e) of the Act. That section deals with three distinct subjects. First, the Commission is given authority to direct a hearing as to the reasonableness of proposed [fol. 46] increased rates and, pending such hearing, it may suspend the effective date of the proposed rate schedule for a maximum of five months, but the Commission may *not* suspend rates for the sale of gas for resale for industrial use only. Where proceedings have not been completed at the expiration of a suspension period the rates may nevertheless to put into effect. Secondly, Section 4(e) deals with the authority of the Commission to order the natural gas

company proposing increased rates to furnish a bond for the refund of rates which are allowed to become effective prior to Commission decision. Finally the section specifies who shall have the burden of proof at hearings and that such hearings shall be given prompt attention.

[4] Clearly, the proviso forbidding the suspension of industrial rates, and upon which United relies, is an exception only to the first portion of Section 4(e), that which grants the Commission authority to suspend rates. No such exception is made to the bonding authority afforded the Commission in the second portion of Section 4(e).

Moreover, the second part of Section 4(e) states that "(w)here increased rates or charges are *thus* made effective * * *" the Commission may order the posting of a bond (italics supplied). United reads this language most narrowly to restrict the authority of this Commission when it maintains, in effect, that the word "thus" refers only to rates which have been suspended and which are made effective after the expiration of the suspension period. Obviously the word "thus" refers to the preceding portion of Section 4(e) which permits rates to "thus" become effective in two ways; either (1) after the expiration of a suspension, which may be of any duration not in excess of five months, or (2) at once in the case of rates for sales for resale for industrial use and which may not be suspended. Surely [fol. 47] United would not claim that a bond could not be ordered in a case where this Commission was permitted to suspend a rate pending hearing but for good cause shown decided to allow that rate to become effective without suspension. Yet that is, in effect, what United now seems to argue.

Even if the reference in Section 4(e) to the Commission's authority to order a bond is read narrowly to apply only to rates which become effective after a suspension, it is clear that such reference is intended, not to limit the Commission's authority, but to negative any inference that without such a provision no bond could be ordered. Under Section 16 and the authority of the [5] Commission to carry out the administration of the Act the Commission can issue orders and attach conditions appropriate to such orders. A fundamental power in such cases is the authority to

require a bond and Section 4(e) in no way prohibits the Commission from exercising this power where industrial rates are sought to be increased.

In addition to the plain language of the statute it is clear that good sense and justice require the interpretation that the Commission's bonding authority extends to rates not subject to suspension. Since such rates are not afforded the protection of suspension and may be subject to collection throughout the period that a proceeding as to their lawfulness is in progress they, more than any others, require the protection of a bond. It is difficult to believe, in the absence of a clear statutory expression, that Congress intended to deprive this one type of gas sale not only of the safeguard of suspension, but also of the safeguard of a bond.

[fol. 48] IV

Consolidation of this Proceeding with Docket No. G-2210 Is Inappropriate Since this Proceeding Presents Unique Questions of Law and Fact and Since Consolidation Would Be Injurious to Mobile.

In its Answer United also urges that if the Commission refuses its request to dismiss Mobile's petition it order this proceeding consolidated in Docket G-2210. Docket G-2210, which itself has been consolidated with other dockets for hearing, is the proceeding involving hearing and investigation of the lawfulness of a number of increased rates proposed by United for certain town border sales and sales for resale to certain large industrial users.

[6] Mobile respectfully submits that consolidation of this proceeding with the matters in Docket G-2210 and the other dockets with which it has been consolidated is wholly inappropriate in this instance. The matters involved in the present proceeding herein relate only to one rate schedule governing sales by United to Mobile for resale to Ideal under a special and unique contract entered into between the three companies. The principal question raised is the propriety of the manner in which United has sought, unilaterally, to abrogate this agreement and whether such unilateral abrogation is permissible without first determining that the existing rate set forth in the said contract.

is "unreasonable". A determination of this question can be made without any need for consolidation with proceedings involving totally different questions and, if the Commission decides in Mobile's favor and rejects United's unilateral filing under Section 4 there will be no proceeding to consolidate.

[fol. 49] Moreover, Mobile submits that if the Commission refuses to reject United's filing and orders a hearing in the present proceeding as to the validity of United's proposed increase Mobile will suffer great harm and prejudice by a consolidation. The proceedings in Docket G-2210 involve many rates; they will unquestionably be lengthy and complex; and they are concerned primarily with the reasonableness of United's newly increased rates rather than any investigation of the "unreasonableness" of existing contract rates. If Mobile is compelled to await a disposition of the matters in Docket G-2210 before its arguments are determined and the validity of United's increase to Mobile covering resales to Ideal is decided, it will be seriously damaged by the fact that it is not afforded the protection of a five months' [7] suspension. Consequently, throughout the lengthy hearings on all of the rates involved in Docket G-2210 Mobile may be obliged to pay the increased rates which it maintains are unlawfully imposed upon it in breach of its contract with United.

The fact that Mobile has intervened in Docket G-2210 is of no relevance to the existence of this proceeding, for the questions there involved are totally different and Mobile, of course, will be prepared to offer any evidence which it may have as to the reasonableness of Uniteds' proposed increases in its other rate schedules for service to Mobile.

Furthermore, as previously discussed, United maintains that this Commission cannot order it to furnish a bond for repayment to Mobile of these increased rates for resale to Ideal if they are ultimately determined to have been unlawfully filed or to be unreasonable. Obviously, if United is correct about the Commission's inability to order a bond, Mobile should not be forced to await a determination of all [fol. 50] of the issues in Docket G-2210 before the legality of United's actions with respect to sales for resale to Ideal is decided.

Wherefore, your petitioner respectfully prays that the Commission issue an order granting it the relief requested in its petition herein; to wit:

(1) That the Commission forthwith enter an order amending and modifying its order of July 10, 1953 so as to provide that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 to United's FPC Gas Tariff, Original Volume No. 1, in so far as they apply to service to Mobile for resale to Ideal, be rejected; and further prays that, in the event the foregoing relief be denied,

[8] (2) the Commission enter an order amending and modifying its order of July 10, 1953 to provide solely for a hearing as to the lawfulness of the filing by United of the said Revised Sheets Nos. 39 and 40; and

(3) That the Commission forthwith issue an order substituting for paragraph (D) of its order of July 10, 1953 a new paragraph (D) reading as follows:

"(D) The request of United that First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be permitted to become effective on July 15, 1953 is denied";

(4) Further prays that the Commission forthwith enter an order directing that any increased rates which United may be entitled to collect from Mobile for sales to Mobile for resale to Ideal shall only be collected subject to refund to Mobile in the event and to the extent that said increased rates shall be determined to be illegal; and

[fol. 51] (5) That the Commission deny United's request that the proceeding in this Docket be consolidated with the proceedings in Docket No. G-2210; and

(6) For such other and further relief as to the Commission may seem just in the premises.

Respectfully submitted, (S.) Winthrop, Stimson, Putnam & Roberts; Johnston, McCall & Johnston, Attorneys for Petitioner Mobile Gas Service Corporation. Samuel M. Johnston, Dan T. McCall, Jr., of Counsel.

Winthrop, Stimson, Putnam & Roberts, William C. Chanler, Elliott E. Vose, Gerard Thomas, of Counsel.

[Verified, September 28, 1953 by William C. Chanler, attorney for Mobile.]

[Certificate of Service dated September 28, 1953 by Elliott E. Vose, of counsel for Mobile.]

[fol. 52] [1] BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-2227

In the Matter of MOBILE GAS SERVICE CORPORATION
PETITION BY MOBILE GAS SERVICE CORPORATION FOR REHEARING AS TO MATTERS DENIED BY THE ORDER OF THE COMMISSION ISSUED DECEMBER 7, 1953

Comes now Mobile Gas Service Corporation ("Mobile") and respectfully applies to the Commission pursuant to Section 19(a) of the Natural Gas Act and the Commission's Rules of Practice and Procedure for a rehearing as to certain relief requested by Mobile and denied by the order of the Commission issued in the above entitled proceeding on December 7, 1953.

Mobile being aggrieved by said order issued December 7, 1953, herewith upon its petition and memorandum in support of said petition, the answer of United Gas Pipe Line Company ("United") and Mobile's reply thereto, all filed herein, respectfully sets forth the following specifications of error and grounds upon which this application for rehearing is based:

[fol. 53] I

[2] Specifications of Errors

Mobile respectfully submits that it was error for the Commission by its order issued December 7, 1953

(a) to refuse to reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 in so far as they apply to sales by United to

Mobile for resale to Ideal Cement Company (herein called "Ideal");

(b) to refuse to modify and amend its order issued July 10, 1953 to provide solely for a hearing as to the lawfulness of the filing by United of the said revised sheets;

(c) to refuse to order that United make refund to Mobile of any portion or all of its said proposed increased rates and charges which may be determined to be illegal or to be unjust and unreasonable; and

(d) to dismiss Mobile's petition herein and to terminate this proceeding.

II

The Grounds for Rehearing

The grounds upon which Mobile seeks rehearing as to the matters denied by the order issued December 7, 1953 as aforesaid are as follows:

[fol. 54]

A

United Cannot Unilaterally Abrogate its Contract with Mobile and Ideal

The facts upon which Mobile has based its proceeding herein are set out in the documents heretofore filed with the Commission. These facts are undisputed by United, and are, in brief, as follows:

[3] In 1946 Mobile proposed to enter into a contract with Ideal Cement Company to supply the latter with natural gas for a period of ten years at a fixed rate which amounted to 12¢ per MCF. At that time, as at present, Mobile purchased all of its natural gas from United and their contract governing sales to Mobile for resale to large industrial customers provided that United should receive a certain percentage of Mobile's proceeds from each such sale, but not less than 16¢ per MCF.

Consequently, before it entered into the proposed contract with Ideal, Mobile notified United of its intention and obtained United's consent and agreement in writing to supply to Mobile the gas for resale to Ideal at percentage

rates which approximated 10.7¢ per MCF. In reliance upon this agreement by United the United-Mobile-Ideal contract was entered into under which Ideal was to receive gas at the 12¢ rate for a period of ten years. This contract was expressly approved by the Alabama Public Service Commission and the United-Mobile contract was duly filed with this Commission.

Subsequently, in 1952, United at the direction of this Commission filed new schedules which had the effect of converting its tariffs from a percentage basis to a dollars and cents basis, but which did not otherwise alter the rate for sales to Mobile for resale to Ideal.

[fol. 55] Thus, until United filed its First Revised Sheet No. 40 and Second Revised Sheet No. 39, providing for an increase in the rate to Mobile from 10.7¢ to 14.5¢ per MCF, the three companies operated under a contract designed to obtain Ideal's business and entered into in reliance upon United's agreement to the rate provisions.

Mobile submits that the Commission, by its order denying Mobile's requested reli , has permitted United unilaterally to abrogate this contractual agreement, has deprived Mobile of a valuable property right without [4] giving Mobile opportunity to be heard, and has caused Mobile to suffer serious losses and damages contrary to the rights given Mobile by its contract with United.

Mobile has consistently maintained that utilities are not powerless to enter into agreements which are binding as to rates. We have previously called to the Commission's attention the decision of the Supreme Court of the United States in *Wichita Railroad & Light Co.* v. *The Public Utilities Commission of the State of Kansas*, 260 U. S. 48, and the decision in *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 985. These decisions recognize the principle that a utility cannot break its contract merely by filing different rates under a regulatory statute but that it must first seek and obtain a determination that the contract which it would abrogate is "unreasonable". We have also maintained that the utility which would thus alter its agreements sustains its burden of showing such contracts to be "unreasonable" by demonstrating that they are injurious to the public interest.

The Commission by its order herein has ruled, in effect, that in the scheme of regulation established by the Natural Gas Act, there is no place for a binding contract between [fol. 56] two utilities or between a natural gas company and its customers; that at any time a contract (or at least its rate provisions) may be revoked by the filing of an increased rate. The contract, in short, becomes virtually meaningless.

Mobile respectfully submits that such a result is not in accordance with the principle of the *Wichita* case, *supra*, and can neither be what Congress intended or what law and equity require.

The inequitable result which follows from such a ruling is immediately apparent in this proceeding. Mobile, in reliance upon the agreement of United to accept a rate of [5] 10.7c per MCF, with United's consent, contracted to sell this gas to Ideal at 12c per MCF for a term of ten years. This contract was approved and put into effect by the Alabama Public Service Commission. The Public Service Law of Alabama (Section 325, Title 48, Alabama Code of 1940), as interpreted by the Supreme Court of that state (*Birmingham Elec. Co. v. Alabama Public Service Commission*, 233 Ala. 675, 173 So. 19), will not permit an intrastate contract to be changed unilaterally even by the Commission itself without the consent of the parties.

Mobile is thus placed in the position of being compelled to sell to Ideal for 12c per MCF gas which it must purchase from United at 14.5c per MCF. This is so despite Mobile's contract with United; despite the fact that the Commission in its order issued July 10, 1953 stated that the proposed increased rates "have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful"; and despite the fact that no obligation has been placed upon United to show at the outset why it is entitled to break its contract with Mobile.

Finally it must be pointed out that in ruling against concepts of a binding contract under the Gas Act, the Commis- [fol. 57] sion necessarily rules against its own authority to put into effect a contract, the rate provisions of which would be substantially binding, even though such power might some day be desirable. A brief example suffices to show the

need for and place of binding rate contracts. Large industrial customers located along gas pipe lines may have the choice of contracting to purchase their gas requirements directly from the pipe line company, or from a local distributing company, which purchases the gas from the pipe line for resale. Since the pipe line company's direct industrial sales are unregulated it can offer the customer a long term contract which will be binding as to its rate. The local utility, on the other hand, will [6] be unable to offer the industrial customer such a firm contract if any agreement the utility makes with the pipe line company as to the rates at which it is to purchase the gas for this resale is always subject to change whenever the pipe line company chooses, unilaterally, to file higher rates. If local utilities companies were unable to give such industrial customers assurance of a binding contract, or even to obtain such assurance from this Commission, they would be unable to compete for business which might well be necessary to their very survival.

It is thus apparent not only that the Commission's order of December 7 stands for a proposition which is alien to our concepts of contract and property rights and weakens the authority of the Commission, but it is also obvious that the order works an incalculable harm upon Mobile, which is caught between the Commission's order depriving it of its contractual rights and the law of its home state, which recognizes and protects the property rights contained in a contract.

Mobile has urged this Commission to revoke United's [fol. 58] filing of these Revised Sheets as an improper effort to avoid its contract. We have had no doubt that the Commission has authority to refuse to accept filings which are not in accordance with the law. Such is the case here where United, without any showing that its contract with Mobile is entitled to be set aside, has attempted to replace that agreement with a rate which is confiscatory of Mobile's property and rights without due process of law.

Consequently, Mobile reasserts its contention that the Commission should not permit its machinery to be utilized unlawfully and that the filing by United should be rejected, and asserts that it was error for the Commission to refuse to do so.

[7] B

It Was Error for the Commission to Refuse a Hearing as to the Lawfulness of United's Filing and to Order United to Make Refund

Mobile recognizes that Section 4 of the Act provides the method whereby rate increases may be effectuated; but Mobile decidedly does not subscribe to the argument, apparently adopted by the Commission, that there is no place in the scheme of the Act or in Section 4 for binding contracts between utilities and their customers. We have urged previously and above that public utilities have not been stripped of the right to make binding contracts, subject to the limitation that where such contracts are injurious to the public interest they may be modified. Consequently, we have urged that absent such a showing in the present proceeding, United's filing should be rejected. However, in the event that the Commission continues to allow United's increased rates to Mobile to remain in effect, it is error for [fol. 59] the Commission to deprive Mobile of the protection which the Natural Gas Act affords it and to which it is plainly entitled by fundamental principles of law.

In the first place, the Commission should order a hearing, as requested by Mobile, as to the lawfulness of United's filing. This hearing can be, in most respects, an ordinary Section 4(e) hearing. However, in its order directing such hearing, the Commission should require United to go forward with the burden of demonstrating that its agreement with Mobile *vis à vis* Ideal is "unreasonable"; that adherence to that agreement is injurious to the public interest because it has become so burdensome to United as to affect its ability to serve its customers properly. United, if it can sustain this burden, can then offer evidence to establish that its proposed new rates are just and reasonable.

[8] In addition to a hearing in which United must establish that its existing contract is "unreasonable," the Commission should also order United to refund to Mobile any portion of its increased rates which are ultimately found to be unlawful. In its order of December 7 the Commission takes the position urged by United that because the rates in question are expressly excluded from the Commission's

power of suspension, they are also beyond the Commission's power to order refund.

We respectfully submit that neither the language of Section 4 nor the intent of Congress can support such a flagrant deprivation of all of Mobile's rights. To adopt this position is to assume that Congress countenanced not only the out-of-hand breach of a solemn agreement without any prior showing of its unreasonableness, but also intended that in addition to such breach of agreement the party offended against should suffer serious financial loss throughout an [fol. 60] indeterminate period in which its rights are under consideration.

It is clear, unless the language is read most narrowly, that the Commission's authority to order a refund extends to all rates "made effective" under Section 4(e), and that the proviso against suspension of industrial rates does not at the same time restrict the power to order refunds. Plainly, if Congress had intended that industrial rates be deprived of the protection of *both* suspension and refund it would have expressly so provided. Instead it did so only as to suspension, which serves to emphasize that no exception to the refunding power was intended.

The Commission, on page 4 of its order, takes the position that "an interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates. * * *." We submit that there [9] is no relationship between the two. In the case of ordinary rate increases suspension postpones the date when the proponent of the increase may start to collect the higher amount, even if it is found justified, and refund protects the purchaser in the event the increase is found unjustified. Thus the purchaser has the double protection of a delayed effective date and of a refund. Where the rates involved are for sales for resale for industrial use only, however, the purchaser is deprived of the protection of a delayed effective date. The seller begins to collect his increased rates promptly after they are filed. Now the Commission would say that not only must the seller receive this advantage over the purchaser when his higher rates are found justified, but also that he may keep any amounts so collected even if they are ultimately found not to be justified.

[fol. 61] The Commission has pointed out that under the consolidated proceedings involving United's rate structures, all of United's rates are being investigated. However, it has dismissed Mobile's petition and caused this proceeding to be terminated without any order or reservation to Mobile of its rights to advance its arguments in the consolidated dockets. Whether Mobile has any right to assert its position in the consolidated dockets or not, it was nevertheless error for the Commission herein to terminate this proceeding without affording Mobile a prompt hearing as to its rights. Such a step is obviously essential in this situation where proposed increased rates which conflict with a contractual agreement have been permitted to go into effect without suspension; where even the minimal protection to Mobile of a refunding order is withheld; and where the long delay involved in a determination of Mobile's rights in the consolidated proceeding would work incalculable harm to Mobile. Moreover, Mobile has no opportunity to pass its own increased costs along to its [10] customers since, as demonstrated previously, the law of its home state will not permit the abrogation of binding contracts.

Plainly, every dictate of law and equity requires that if the Commission will not reject United's filing it must direct a prompt hearing on Mobile's contentions herein and, pending a final determination of the lawfulness of United's action, that United be required to refund any portion of the increased rate received from Mobile which may ultimately be held unlawful.

Wherefore, by reason of the grounds hereinabove set forth, Mobile respectfully prays that the Commission forthwith grant a rehearing of its said order issued on De-[fol. 62] cember 7, 1953 with reference to matters herein complained of and further that the Commission grant such other relief as may seem just in the premises.

Respectfully submitted, Winthrop, Stimson, Putnam & Roberts, Attorneys for Petitioner, Mobile Gas Service Corporation.

William C. Chanler, of Counsel.

[Verified January 6, 1954, by William C. Chanler]

[Certificate of Service dated January 6, 1954, by Gerard Thomas]

[fol. 63] BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, NELSON LEE SMITH, DALE E. DOTY and SEABORN L. DIGBY.

Docket No. G-2227

In the Matter of Mobile Gas Service Corporation

ORDER DENYING APPLICATION FOR REHEARING—February 4, 1954

Upon consideration of Mobile Gas Service Corporation's application for rehearing filed January 6, 1954, of the Commission's opinion and order issued in the above-entitled proceeding on December 7, 1953, and the allegations in support thereof;

The Commission *finds:*

No new facts have been presented or alleged, and no new principles of law have been set forth in the application for rehearing which either were not fully considered by the Commission before it entered the opinion and order issued December 7, 1953, or having now been considered, warrant rehearing, modification or rescission of the aforesaid opinion and order. Accordingly, it is necessary and appropriate for carrying out the provisions of the Natural Gas Act that the aforesaid [fol. 64] application for rehearing be denied as hereinafter ordered.

The Commission *orders:*

Mobile Gas Service Corporation's application for rehearing of the Commission's opinion and order issued

December 7, 1953, in the above-entitled matter be and the same is hereby denied.

By the Commission. Leon M. Fuquay, Secretary. (Seal)

Adopted: February 3, 1954

Issued: February 4, 1954

[fol. 65]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Mobile Gas Service Corporation, Petitioner,

v.

Federal Power Commission, Respondent.

PETITION TO REVIEW AND SET ASIDE OPINION AND ORDER OF THE FEDERAL POWER COMMISSION—March 18, 1954

To the United States Court of Appeals for the Third Circuit and the Honorable Justices thereof:

Mobile Gas Service Corporation* herewith respectfully petitions this Court to review the opinion and order of the Federal Power Commission** issued December 7, 1953 in Docket No. G-2227, entitled "In the Matter of Mobile Gas Service Corporation." The opinion and order is printed in the Appendix hereto (App. p. 1).

The Issue Presented

The issue sought to be reviewed can be simply stated:

Does the Natural Gas Act render a duly filed contract for the purchase of natural gas at agreed rates for a term of years void *ab initio*, or merely voidable upon a finding that the contract contravenes the public interest?

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* Herein sometimes called "Mobile" or petitioner.

** Herein sometimes called "Commission" or respondent.

[fol. 66] The Nature of the Administrative Proceedings Sought to be Reviewed

Mobile is seeking review of an order of the Commission pursuant to which it has been deprived of its rights under a duly filed contract for the purchase of natural gas at an agreed rate over its objection, and without any hearing or determination that the public interest required that the contract be abrogated.

Mobile is a public utility under the laws of Alabama distributing and selling natural gas to consumers in Mobile, Alabama and the surrounding communities and areas. Much of Mobile's business is in the resale of natural gas to industrial customers. It purchases its entire supply of gas for these resales from United Gas Pipe Line Company,* a natural gas company within the meaning of the Natural Gas Act (52 Stat. 821, 15 U.S.C., § 717(a)(6)).

Mobile's purchases of gas from United are made pursuant to a contract entered into between Mobile and a predecessor to United in January, 1936, as modified by later agreement between Mobile and United in October, 1941 and July 1946. These agreements as modified provide that for gas for resale to industry Mobile will pay United certain percentages of Mobile's proceeds from the resales, but in any event not less than 16¢ per MCF of gas unless United has agreed in writing to accept less than 16¢. These contracts were filed with the Federal Power Commission as United's Gas Rate Schedule FPC No. 20 and Supplement Nos. 7 and 9 thereto.

In 1946 Mobile proposed to contract with Ideal Cement Company to supply it with natural gas for a period of ten years at a fixed rate of 12¢ per MCF. Mobile advised United of this proposal and requested that it accept the percentage of Mobile's proceeds from the resales to Ideal [fol. 67] provided for in its contract with Mobile even though this percentage would return United less than 16¢ per MCF, the minimum rate to which it was entitled by that contract.

On July 30, 1946 United agreed in writing to Mobile's request, and in reliance on this agreement by United, Mo-

* Herein sometimes called "United."

bile entered into the contract to supplpy gas to Ideal at 12¢ per MCF for ten years.* This contract was expressly approved by the Alabama Public Service Commission, and United's agreement to accept less than 16¢ per MCF for gas sold to Mobile for resale to Ideal was duly filed with the Federal Power Commission as Supplement No. 10 to United's Gas Rate Schedule FPC No. 20, thus becoming the legal rate for such sales.

The percentage rates which United thus agreed to accept resulted in payments by Mobile to United at an actual rate of 40.7¢ per MCF for the gas which United supplied for resale to Ideal. In May, 1952 United replaced its percentage rates on file with the Federal Power Commission with its FPC Gas Tariff Original Volume No. 1, which substituted a flat rate of 10.7¢ per MCF for gas sold to Mobile for resale to Ideal. For the percentages provided for under the original United-Mobile-Ideal agreement. United informed Mobile that this filing was made in order to comply with a Commission requirement that all its rates be converted from a percentage basis to a dollars and cents basis.

Thus United's sales of gas to Mobile at 10.7¢ per MCF for resale to Ideal at 12¢ per MCF continued pursuant to the United-Mobile-Ideal contract until June 24, 1953. On that day United filed with the Commission a number of proposed increases in its rates for certain town border sales, including First Revised Sheet No. 46 and Second Revised Sheet No. 39 to its Gas Tariff Original Volume No. 1, which provided for an increase from 10.7¢ to 14.5¢ per MCF in the rate to Mobile for resales to Ideal. The [fol. 68] Commission on July 10, 1953 issued an order which stated, in part, that these increased rates and charges "* * * have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful" and ordered these rates suspended pending a hearing as to their lawfulness. However, since Section 4 (e) of the Natural Gas Act prohibits the suspension of proposed increased rates for sales for resale for industrial use only, the Commission's order

* Herein sometimes referred to as the United-Mobile-Ideal contract.

did not suspend the new rate to Mobile, but expressly permitted it to go into effect on July 25, 1953. Thus Mobile has been compelled since that date to pay 14.5¢ per MCF to United for gas which it is obligated to resell to Ideal Cement Company for 12¢ per MCF. The proceeding involving all of these rate increases sought by United was denominated Docket G-2210 by the Commission and was ordered consolidated with a number of other proceedings already pending dealing with United's rates and charges.

In response to United's attempt to substitute this 14.5¢ rate to Mobile for the 10.7¢ rate agreed upon in their contract, Mobile, on August 4, 1953, filed its petition protesting United's action and asserting its contract rights.* Mobile contended that United could not, unilaterally and without Mobile's assent, abrogate the contract between them *by the mere filing of an increased rate;* that the contract was binding and effective unless and until the Commission found after a hearing that the contract was so unreasonable that the public interest required that it be abrogated. In its petition Mobile requested that United's filing of this increased rate be rejected by the Commission as unlawful. [fol. 69] It also prayed that if the Commission would not reject United's filing it (a) order a hearing solely as to the lawfulness of United's filing of the increased rates and charges in violation of its contract with Mobile and (b) that it enter an order directing that United refund any portion or all of the increased rates or charges collected from Mobile (1) if the filing by United is unlawful or (2) if these rates are ultimately found to be unlawful.

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* Mobile's petition was originally filed in the pending consolidated proceeding, Docket G-2210, *et al.* However, since Mobile's motion for permission to intervene in that proceeding had not been granted at the time of the filing, and since it was apparent that immediate relief could not be obtained in Docket G-2210, the petition was amended so as to request the assignment of a separate docket number. This request was granted and Mobile's petition was assigned Docket G-2227, which is the docket in which the order herein appealed from was issued. This proceeding was never ordered consolidated with the proceedings in Docket G-2210, *et al.*

United, on September 11, 1953, petitioned to intervene in this proceeding and interposed an answer to Mobile's petition in which it opposed all of the relief requested by Mobile and asserted, in substance, that its contract with Mobile was not binding or enforceable as against United's mere filing of the higher rate. On September 28th Mobile filed its reply to United.

Thereafter, no hearings or other proceedings took place in the matter (Docket G-2227) until on December 7, 1953 the Commission issued the order and opinion which is the subject of this Petition to Review.

That order is set out in full in the Appendix and therefore will not be repeated fully here (App. p. 1). Suffice it to say that the opinion and order deny all of the relief requested by Mobile and order the proceeding terminated and Mobile's petition dismissed. The Commission refuses to reject United's filing of the increased rate and says that the filing is proper and lawful and that rate increases may be initiated by a natural gas company only pursuant to Section 4 of the Natural Gas Act. The Commission thus holds in effect that a duly filed rate contract, such as that here in issue, is void *ab initio*.

The Commission likewise refuses to order United to refund the increased amounts collected from Mobile if the filing is illegal or if the increased rate is found to be unlawful. This relief is denied Mobile on the ground that [fol. 70] because the Commission is specifically prevented by the proviso in Section 4 (e) of the Natural Gas Act from ordering the suspension of rates for resale for industrial use only it is also without authority to order a refund in the case of such rates.

Finally, the Commission states that questions relating to the reasonableness of United's proposed increase in rates and charges are already at issue in other pending proceedings and refuses to order a separate hearing solely as to the unlawfulness of United's filing. The Commission indicates that Mobile could be heard in Docket G-2210, but that proceeding deals only with the reasonableness of the proposed new rates, and not with the question of the reasonableness of United's existing contract. Thus Mobile is at one and the same time deprived of its contract rights

and required to pay a confiscatory rate, without any finding or determination whatsoever that its existing contract with United is against the public interest. It is subjected to this action peremptorily, without a hearing and without even the protection of a bond or a refund order.

Being aggrieved by the Commission's order issued December 7, 1953 Mobile on January 6, 1954 filed with the Commission its petition for a rehearing. This petition was denied by the Commission in its order issued February 4, 1954.*

Jurisdiction and Venue

The statute upon which venue and jurisdiction in this case are based is Section 10(b) of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 831; 15 U.S.C. 717r (b)), the pertinent part of which reads as follows:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [fol. 71] circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

United is a natural-gas company organized and existing under and by virtue of the laws of the State of Delaware and thus is located in the Third Circuit within the meaning of Section 19(b) of the Natural Gas Act. The facts upon which jurisdiction is based are briefly stated. United is a natural-gas company within the meaning of the Natural Gas Act and is subject to the jurisdiction of the Commission. Mobile, the petitioner, is a party to the proceedings before the Commission wherein the Commission issued the order and opinion of December 7, 1953 hereinabove re-

* This order is reprinted at page 8a in the Appendix.

ferred to relating to United, and Mobile is aggrieved by that order, since it is thereby deprived of its contract rights without a hearing, and is compelled to pay 14.5¢ per MCF for gas which it is obligated to resell for 12¢ per MCF. Within thirty days after the date of the order Mobile, pursuant to Section 19(a) of the Natural Gas Act, filed with the Commission its petition for rehearing. This application for rehearing of the Commission's opinion and order was denied by Commission order issued February 4, 1954 (App. p. 8a) and thus denied within the meaning of Section 19 of the Natural Gas Act. It is therefore apparent from the action by the Commission that this petition to review is filed within the sixty day period fixed by Section 19(b) of the Act.

[fol. 72] Grounds upon Which Relief Is Sought

1. The Commission erred in refusing to reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 in so far as they apply to sales by United to Mobile for resale to Ideal. A rate contract which has been duly filed with the Federal Power Commission is not void *ab initio*, but is a valid, binding and enforceable contract until and unless modified or abrogated after a hearing and finding by the Commission that it is so unreasonable or otherwise so burdensome that the public interest requires that it be abrogated or modified. Such a contract rate cannot be repudiated by a mere *ex parte* filing under Section 4 of the Act of a proposed higher rate by one party to the contract. Such a filing, being unlawful and unauthorized by the Act, should be rejected, and the Commission's refusal to reject it has deprived Mobile of its property and rights without due process of law.

2. Having refused to reject the filing, the Commission erred in refusing to modify and amend its order of July 10, 1953 so as to provide for a hearing solely as to the lawfulness of the filing by United of the said revised sheets. The reason given by the Commission for such refusal, that all questions relating to the reasonableness of United's proposed new rates were pending before it in another proceeding, affords no relief to Mobile, inasmuch as the only matters before the Commission in that proceeding are the

reasonableness of such new rates, as distinguished from the reasonableness of Mobile's contract with United. If such new rates are found by the Commission to be reasonable, they will become the legal and effective rates, even though Mobile's contract may itself be perfectly reasonable. The effect of this refusal, therefore, is to deprive Mobile of any opportunity at any time to test the lawfulness and [fol. 73] reasonableness of its existing contract, and to compel it to pay a rate in excess of the contract rate without an opportunity to be heard.

3. The Commission erred in refusing to order that United make refund to Mobile of any portion or all of the increased rate collected from Mobile which may be determined to be illegal or to be unjust and unreasonable. As a result of this refusal by the Commission, Mobile may be compelled to pay rates which will later be found to be illegal, unjust or unlawful, without any opportunity to recover the same at any time, and to pay such rates before there has been any hearing or determination that they are legal, just or reasonable. Such a result is a deprivation of Mobile's property and rights without due process of law.

4. The Commission erred in dismissing Mobile's petition herein and in terminating the proceeding. Such dismissal and termination deprives Mobile of any opportunity to be heard as to its rights under its contract.

Conclusions

WHEREFORE, Petitioner prays:

1. That a copy of this petition be served forthwith upon a member of Respondent, Federal Power Commission, in accordance with Section 19(b) of the Natural Gas Act;

2. That Respondent, Federal Power Commission, be required, in conformity with Section 19(b) of the Natural Gas Act and Rule 18(7) of this Court, to certify and file with this Court a transcript of the record upon which the order and opinion here sought to be reviewed were entered;

3. That petitioner be notified by the Clerk of this Court when said transcript has been received;

[fol. 74] 4. That this Court review the Commission's opinion and order issued December 7, 1933 and upon such review (a) reverse and set aside the said opinion and order;

(b) order that the Commission reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39; (c) and order that United be directed to refund to Mobile with interest all rates and charges collected by it from Mobile in excess of 10.7¢ per M C F for sales of natural gas for resale to Ideal.

5. That this Court exercise jurisdiction over the parties and subject matter of this petition and grant to petitioner such other and further relief as the rights and equities of the cause may require and as to the Court may seem just in the premises.

Respectfully submitted, Mobile Gas Service Corporation, by Winthrop, Stimson, Putnam & Roberts, its attorneys, (S.) William C. Chanler, a Member, Johnston, McCall & Johnston, Counsel for Mobile Gas Service Corporation.

Dated: March 8, 1954.

[fol. 75] *Duly sworn to by William C. Chanler, March 8, 1954. Jurat omitted in printing.*

[fol. 75a] [File endorsement omitted]

[fol. 76]

Before the Federal Power Commission.

Commissioners: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey

In the Matter of United Gas Pipe Line Company

Order Allowing Supplemental Rate Schedule to Take Effect December 4, 1941

It appearing to the Commission that an application has been filed by United Gas Pipe Line Company, requesting that the United Gas Pipe Line Company Supplement No. 7 to Rate Schedule FPC No. 20, providing for the sale of natural gas to Mobile Gas Service Corporation, be allowed

to take effect as of July 1, 1941; and the Commission having considered the same;

It is *ordered* that:

(A) The aforesaid supplemental rate schedule be and it is hereby allowed to take effect as of July 1, 1941;

(B) The aforesaid supplemental rate schedule shall be deemed to have been filed and published in compliance with the Natural Gas Act;

(C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7(b) of the Natural Gas Act; nor shall it be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein;

[fol. 77] (D) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now pending, or hereafter instituted, against the applicant.

(Seal) By the Commission.

(S.) Leon M. Fuquay, Secretary.

Before the Federal Power Commission

Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse and Nelson Lee Smith

In the Matter of United Gas Pipe Line Company

Order Allowing Supplemental Rate Schedule to Take Effect—September 17, 1946

Upon consideration of the application filed by United Gas Pipe Line Company requesting that Supplement No. 10 to Supplement No. 7 to its Rate Schedule FPC No. 20 providing for the sale of natural gas to Mobile Gas Service Corporation for resale be allowed to take effect as of July 26, 1946;

The Commission *orders* that:

(A) The aforesaid supplemental rate schedule be and it hereby is allowed to take effect as of July 26, 1946;

(B) The aforesaid supplemental rate schedule shall be deemed to have been filed and published in compliance with the Natural Gas Act;

[fol. 78] (C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the above designated rate schedule; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;

(D) This order is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending, or hereafter instituted, by or against the applicant.

By the Commission.

J. H. Gutride, Acting Secretary.

Date of Issuance: September 23, 1946.

Before the Federal Power Commission
Letter Order on Supplement No. 9
Federal Power Commission,

Washington 25

Re: United Gas Pipe Line Company
Supplement No. 9 to
Rate Schedule FPC No. 20,

November 4, 1946.

Gentlemen:

This is to advise you that the above rate filing submitted by your company has been accepted for filing and that January 1, 1947 has been designated as the effective date thereof.

[fol. 79] This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constitut

ing approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in above designated rate schedule; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

Very truly yours, Leon M. Fuquay, Secretary.

Messrs. Leighton & Gamble, National Savings & Trust Bldg., Washington 5, D. C.

Before the Federal Power Commission

Statement Pursuant to Section 154.85 of F. P. C. Rules and Regulations

May 29, 1952.

Reference: F. P. C. Rate Schedule No. 20

United Gas Pipe Line Company

This statement is made pursuant to Section 154.85 of Federal Power Commission Rules and Regulations with reference to the existing Gas Sales agreement between United Gas Pipe Line Company and Mobile Gas Service Corporation, or their predecessors in title, dated January 1, 1936, as amended and supplemented.

This Contract, as amended and supplemented, continues in effect as an executed Service Agreement for service to the extent that the provisions thereof are not superseded by or inconsistent with the applicable provisions of the Rate [fol. 80] Schedules and General Terms and Conditions of United Gas Pipe Line Company's Federal Power Commission Gas Tariff.

The following provisions of said contract, and amendments and supplements thereto (herein identified by F. P. C. Supplement Number to the above numbered Rate Schedule)

remain in effect and have not been superseded by said Gas Tariff:

	Part Retained
Preamble	All
Article I	All
" II	All
" III	All
" IX	Last paragraph
" XI	All
" XII	All
" XIV, as amended by Supplement No. 7	All of Article XIV and Article 4 of Supplement No. 7
" XVI	All
" XVII	All
" XVIII	All
Testimonium Clause and Signatures	All
Supplements:	
Supplement No. 3 to Supplement No. 9	Last paragraph on Page 3 and 1st paragraph on page 4, and Exhibit A thereto.
Supplement No. 4 to Supplement No. 9	Last paragraph on page 3 and 1st paragraph on page 4, and Exhibit A thereto.
Supplement No. 8 to Supplement No. 9	Last 2 lines on page 3 through 1st full paragraph on page 4, and Exhibit A thereto.
Supplement No. 10	All of page 1 and 1st paragraph through the work "delivery" in the 8th line of page 2

[fol. 81] Before the Federal Power Commission

Very truly yours, Leon M. Fuquay, Secretary.

Commissioners: Thomas C. Buchanan, Chairman; Dale E. Doty and Harrington Wimberly

Docket No. G-2019

In the Matter of United Gas Pipe Line Company

Order Allowing Conversion Tariff to Become Effective, in Part, Suspending Conversion Tariff, in Part, and Suspending Notices of Cancellation—July 31, 1952

On July 3, 1952, United Gas Pipe Line Company (United) filed its proposed conversion tariff, which, unless suspended, will become effective August 3, 1952, and will result in an increase of approximately $9,500,000 to five natural-gas pipe-line companies, based upon United's estimated sales for the twelve-month period ending April 30, 1953. The proposed conversion tariff is designated United Gas Pipe Line Company's FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2.

Concurrently with its filing of July 3, 1952, and subsequently on July 11, 1952, United submitted proposed notices of cancellation of rate schedules on file with the Commission covering, in whole or in part, sales of natural gas which United alleges are no longer in interstate commerce and subject to the jurisdiction of the Commission, or have never been subject to the jurisdiction of the Commission because they do not involve sales of gas in interstate commerce. The proposed notices of cancellation are set forth in Appendix A hereof.

Included in the proposed notices of cancellation is a notice of cancellation purporting to cancel, in part, Rate Schedule FPC No. 73, which covers the sale of natural gas by United to Willmut Gas & Oil Company (Willmut), a distributor [fol. 82] of natural gas in Mississippi. Willmut objects to said proposed cancellation asserting that the question of the jurisdiction of the Commission over all of United's sales to Willmut are at issue in the complaint proceeding entitled

In the Matter of Willmut Gas & Oil Company, et al. v. United Gas Pipe Line Company at Docket No. G-1158, in which proceeding hearings have been held, briefs have been filed, and the matter is now pending before the Presiding Examiner for initial decision.

By its proposed conversion tariff and proposed notices of cancellation United proposes to supersede all of the rate schedules it has on file with the Commission.

The principal changes which would be effected by the proposed conversion tariff for city-gate sales are the establishment of specific rates for industrial gas in lieu of the existing revenue-sharing arrangements, a changeover from all-requirement service to specific volumetric obligations upon execution of new service agreements, the elimination of tax adjustment clauses and provisions relating to negotiation of changes in rates, standardization of measurement bases and billing practices, and minimum heat content guarantee.

The proposed conversion tariff respecting sales to and services for United's pipe-line customers involves (a) restatements of two rate schedules as Rate Schedules PL-1 and PL-2 without change, (b) proposed substantial increases in rates for other sales under the conversion tariff Rate Schedule PL-3, and (c) proposed substantial increases in rates for transportation services under the conversion tariff Rate Schedules T-1, T-2, and T-3. The increases in rates approximate $9,500,000 under the proposed conversion tariff Rate Schedules PL-3, T-1, T-2, and T-3.

United also requests permission, pursuant to Section 154.52 of the Regulations under the Natural Gas Act (18 CFR 154.52), to file the transportation contract with Mississippi River Fuel Corporation and three exchange service arrangements, now rendered under letter agreements, as [fol. 83] special rate schedules to be contained in Original Volume No. 2. No changes are proposed in these arrangements.

In addition, United filed, pursuant to Section 154.85 of the Regulations under the Natural Gas Act (18 CFR 154.85), statements of the presently effective rate schedules, identifying the contract provisions which are not superseded by or in conflict with other applicable provisions of the rate

schedules and the General Terms and Conditions of the proposed tariff and which are to remain in effect.

United asserts that increased rates are necessary because of the impact of the general trend of increasing costs, including the cost of purchased gas, the Texas gas gathering tax, proposed payroll increases, and pension costs for past service benefits.

In addition to adjustments to book costs for the foregoing, United's claimed costs of service are premised on a rate base including the total amounts in its Gas Plant Acquisition Adjustment account which, in whole or in part, may be improper for this purpose; and amounts for working capital which have been computed without regard to the availability of Federal and other tax accruals for such purpose. United also claims a rate of return of 6½% without submitting financial facts in support thereof, income taxes associated with such rate of return, and the expense of amortizing the total amounts in the aforesaid Gas Plant Acquisition Adjustment account on an accelerated basis.

It appears, therefore, that for these reasons, among others, the proposed increase in rates and charges as contained in proposed Rate Schedules PL-3, T-1, T-2, and T-3 and changes in conversion tariff provisions relating thereto may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful, and may place an undue burden upon ultimate consumers of natural gas.

All of United's customers, as well as interested regulatory agencies, were invited to submit comments with respect to the application for the proposed changes in rates. Com- [fol. 84] ments have been received from the five pipe-line customers, seven city-gate customers, and two State commissions. Generally, the customers and State commissions object to the proposed increase, or assert they are unable to determine that the proposed increase is justified, or request that the Commission suspend the proposed conversion tariff.

The Commission *finds*:

(1) It is necessary or appropriate to carry out the provisions of the Natural Gas Act and to aid in the enforcement thereof in the public interest, that the Commission enter upon a hearing pursuant to the authority contained in Sec-

tion 4(e) thereof, concerning the lawfulness of the proposed rates, charges, classifications or services contained in Rate Schedules PL-3, T-1, T-2, and T-3 as set forth in United's proposed conversion tariff together with the applicable General Terms and Conditions and pre-existing contract statements pertinent thereto; and concerning the lawfulness of the proposed notices of cancellation listed in Appendix A hereof and, pending hearing and decision thereon, that the operation of United's proposed Rate Schedules PL-3, T-1, T-2, and T-3 together with the applicable General Terms and Conditions and pre-existing contract statements pertinent thereto; and United's proposed notices of cancellation as set forth in Appendix A hereof be suspended and the use thereof deferred as provided by the Natural Gas Act. In all other respect it is appropriate to permit United's FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, to become effective as of August 3, 1952.

(2) Good cause has been shown to permit the filing of the special operating arrangements set forth in Original [fol. 85] Volume No. 2 as special rate schedules pursuant to the provisions of Section 154.52 of the Commission's Regulations under the Natural Gas Act.

The Commission *orders*:

(A) Pursuant to the authority contained in Section 4 of the Natural Gas Act, a public hearing be held at a time and place and at a date to be fixed by further order of the Commission concerning the lawfulness of the rates, charges, classifications or services, subject to the jurisdiction of the Commission, as set forth in proposed Rate Schedules PL-3, T-1, T-2, and T-3 of United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto; and concerning the lawfulness of the proposed notices of cancellation set forth in Appendix A hereof.

(B) Pending such hearing and decision thereon, United Gas Pipe Line Company's proposed Rate Schedules PL-3, T-1, T-2, and T-3 as set forth in United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1,

including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto; and United Gas Pipe Line Company's proposed notices of cancellation set forth in Appendix A hereof, be and the same are hereby suspended and their use deferred until January 3, 1953, and until such further time as such proposed rate schedules, applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, and proposed notices of cancellation may be made effective in the manner prescribed by the Natural Gas Act.

[fols. 86-87] (C) In all other respects, United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, be and they are hereby allowed to become effective as of August 3, 1952.

(D) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, particularly subsections (b) and (c) thereof; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such services or rates provided for in the above-described tariff, the applicable General Terms and Conditions together with pre-existing contract statements pertinent thereto; nor shall it be deemed as recognition of any claimed contractual right or obligation affecting or relating to such services or rates.

(E) This order is without prejudice to any findings or orders which have been or may hereafter be made by this Commission in Docket No. G-1142, Docket No. G-1158, and in any proceeding now pending, or hereafter instituted, by or against United Gas Pipe Line Company.

(F) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) [18 CFR 1.37(f)] of the Commission's Rules of Practice and Procedure.

(G) The effective date of this order shall be July 31, 1952.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: August 1, 1952.

[fol. 88] BEFORE THE FEDERAL POWER COMMISSION

Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Leland Olds and Harrington Wimberly

Docket No. G-1142

In the Matter of UNITED GAS PIPE LINE COMPANY

ORDER INSTITUTING RATE INVESTIGATION—October 12, 1948

It appearing to the Commission that:

(a) United Gas Pipe Line Company (United Gas) owns and operates a natural-gas transmission pipe-line system located in the States of Texas, Mississippi, Louisiana, Alabama and Florida, and by such operations Applicant is engaged in the transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission in its order of November 10, 1942, in Docket No. G-232 (3 FPC 863).

(b) On the basis of data available to the Commission, the rates, charges, services or classifications for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission by United Gas [fol. 89] Pipe Line Company may be unjust, unreasonable; unduly discriminatory or preferential.

The Commission *finds* that:

It is necessary and proper in the public interest, and to aid in the enforcement of the provisions of the Natural Gas Act, that an investigation be instituted by the Commission into and concerning any rate, charge, service or classification, demanded, observed, charged or collected by United Gas Pipe Line Company, for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and any rule, regulation, practice, or contract affecting such rate, charge, service or classification.

The Commission, on its own motion, *orders* that:

An investigation be and it hereby is instituted for the purpose of enabling the Commission:

(A) To determine whether any rate, charge, service, or classification demanded, observed, charged or collected by United Gas Pipe Line Company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission or any rule, regulation, practice or contract affecting such rate, charge, service, or classification, is unjust, unreasonable, unduly discriminatory or preferential;

(B) If, after hearing, it shall find that any such rates, charges, services, classifications, rules, regulations, practices or contracts are unjust, unreasonable, unduly discriminatory or preferential, to determine and fix by appropriate order or orders, just, reasonable, non-discriminatory or non-preferential rates, charges, services, classifications, rules, [fol. 90] regulations, practices or contracts to be thereafter observed and in force.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: October 13, 1948.

Before the Federal Power Commission

Commissioners: Jerome K. Kuykendall, Chairman; Dale E. Doty, Claude L. Draper and Nelson Lee Smith

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

In the Matter of United Gas Pipe Line Company

Order Suspending Proposed Rate Schedules, Permitting Proposed Rate Schedules to Become Effective on Thirty Days' Notice Pending Hearing, Consolidating Proceedings, and Fixing Date of Hearing.—July 10, 1953

On June 24, 1953, United Gas Pipe Line Company (United) tendered for filing its First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Re-

vised Sheets Nos. 23, 31 and 39 to its FPC Gas Tariff, Original Volume No. 1, containing increased rates and charges for certain town-border sales, proposed to be made effective as of July 15, 1953.

The increased rates and charges would result in an estimated increase of $1,691,000 per year based on actual sales for the calendar year 1952, or $1,678,000 based on estimated [fol. 91] sales for the year 1953, in the rates and charges presently on file with the Commission in United's tariff.

From the data filed by United the increased rates and charges provided in said proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, Second Revised Sheets Nos. 23, 31 and 39, as tendered for filing on June 24, 1953, have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful. By reason of the proviso of Section 4(e) of the Natural Gas Act,[1] however, the proposed increase in rates reflected in First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39, are subject to investigation in these proceedings and such revision as may be appropriate after hearing, but are not subject to suspension. Since good cause has not been shown by United for the requested effective date of July 15, 1953, as required by Section 4(d), First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 can only be permitted to become effective on July 25, 1953, *i. e.*, upon thirty days' notice as provided in Section 4(d).

The rates and charges proposed to be increased by United are among the rates and charges which are the subject of the consolidated proceedings in *In the Matters of United Gas Pipe Line Company*, Dockets Nos. G-1142, G-1508, G-2019, and G-2074. These proceedings are in recess until July 20, 1953, at which time United is to complete its case-in-chief in those proceedings.

The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capi-

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[1] "*Provided*, That the Commission shall not have authority to suspend the rate, charge, classification or service for the sale of natural gas for resale for industrial use only."

tal, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Dockets Nos. G-1141, G-1508, G-2019, and G-2074.

It appears appropriate and desirable to consolidate the [fol. 92] proposed application filed on June 24, 1953, for an increase in rates with the proceedings in the consolidated Dockets Nos. G-1142, G-1508, G-2019, and G-2074 so that the common issues raised by these various proceedings may be heard together.

By letter of June 26, 1953, customers of United and interested State commissions were invited to make comments in regard to the rate increase application filed June 24, 1953. Comments were received from the Alabama Public Service Commission, the cities of Tyler, Texas, and Bastrop, Louisiana, and six customers. Generally, objections were made to the proposed rate increase. No comment was received from United Gas Corporation which is the principal town-border customer and the parent company of United.

The Commission *finds:*

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act and good cause exists for the Commission to enter upon a hearing on July 20, 1953, pursuant to the authority contained in Section 4 of such Act, concerning the lawfulness of United's FPC Gas Tariff, Original Volume No. 1, as proposed to be amended by First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39, and that said proposed sheets, with the exception of First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39, be suspended as hereinafter provided and the use thereof deferred pending hearing and decision thereon.

(2) Good cause has not been shown for waiver of the 30 days' notice requirement of Section 4(d) of the Natural Gas Act with respect to First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39.

[fol. 93] (3) Good cause exists for further consolidating the proceeding involving the proposed increased rates and charges contained in the proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second

Revised Sheets Nos. 23, 31 and 39 with the proceedings in consolidated Dockets Nos. G-1142, G-1508, G-2049, G-2074.

(4) Good cause exists for fixing the date of hearing less than fifteen days after publication of this order in the Federal Register.

(5) It is necessary and appropriate to carry out the provisions of the Natural Gas Act, and it is in the public interest that the procedure hereinafter prescribed shall be followed at the hearing in order to conduct these proceedings with reasonable dispatch.

The Commission *orders:*

(A) A public hearing be held at 10:00 a. m. (EDST), on July 20, 1953, in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C., concerning the lawfulness of the rates, charges, classifications, and service, subject to the jurisdiction of the Commission, as set forth in United's FPC Gas Tariff, Original Volume No. 1, as proposed to be amended by the revised sheets described in Paragraph (B) hereof.

(B) The proceeding in Docket No. G-2210, involving United's First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39, and the proceedings in Dockets Nos. G-1142, G-1508, G-2049, and G-2074 be and they hereby are consolidated for purpose of hearings.

(C) Pending such hearing and decision thereon, United First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 118, 119, and 120, [fol. 94] and Second Revised Sheet No. 23, to its FPC Gas Tariff, Original Volume No. 1, be and the same are hereby suspended and the use thereof deferred until December 25, 1953, unless otherwise ordered by the Commission, and until such further time thereafter as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.

(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953.

(E) At the hearing United shall go forward first and shall present and complete its case-in-chief with respect to its FPC Gas Tariff, as amended by the revised sheets set

forth in Paragraph (B) above, before cross-examination is undertaken of United's presentations in the consolidated proceedings.

(F) Interested State commissions may participate as provided by Section 1.8 and 1.37(f) [18 CFR 1.8 and 1.37(f)] of the Commission's Rules of Practice and Procedure.

By the Commission.

Leon M. Fuquay, Secretary.

Adopted: July 10, 1953

Issued: July 10, 1953

[fol. 95] Before Federal Power Commission

Dockets Nos. G-1142, G-1508, G-2019, G-2074 and G-2210

In The Matter of United Gas Pipeline Company

Petition of Mobile Gas Service Corporation for Leave to Intervene

Your petitioner Mobile Gas Service Corporation, respectfully represents that:

1. Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Alabama, with its principal office of business in the City and County of Mobile, Alabama, and is a public utility, owning and operating a plant and distribution system for the purchase, sale and distribution of natural gas in the Cities of Mobile, Prichard, Chickasaw, Mobile County, Alabama, and their environs, including the villages of Whistler, Spring Hill and Brookley Field, and others, and has been so engaged for many years.

2. The names, title and post office addresses of the persons to whom correspondence or communications in regard to this petition are to be addressed are:

Maurice White, President, Mobile Gas Service Corporation, 182 St. Francis Street, Mobile, Alabama, and Sam M. Johnston, Attorney, P. O. Box 550, 804 First National Bank Annex, Mobile, Alabama.

3. The Corporation purchases all of its natural gas re-

quirements from United Gas Pipe Line Company (hereinafter called "United"), the Applicant for increased rates [fol. 96] in Docket Nos. G-1142, G-1508, G-2019, G-2074 and G-2210. Such proposed increased rates will increase the demand charge to Petitioner from 23 cents per MCF to 25 cents per MCF. The charge for excess gas deliveries will increase from 14 cents per MCF to 16½ cents per MCF; and such proposed rates will increase the charge for gas sold to its customer, Ideal Cement Company, from 10.7 cents per MCF to 14.5 cents per MCF.

4. Petitioner has a material and substantial interest in supplying of gas to consumers in its service area. It is not adequately represented by existing parties to this proceeding, and its interest may be adversely affected by the Commission's action therein.

Wherefore, Petitioner respectfully prays that your Honorable Commission will authorize its intervention in the consolidated proceeding and permit it to be made a party thereto; permit it to introduce evidence with reference to the matters pertinent to the proceedings; to cross-examine witnesses; and to take such other and further steps as will enable said petitioner to protect its interest and the interest of the public being served by it.

Respectfully submitted, Mobile Gas Service Corporation, By (S.) Maurice White, President.

State of Alabama,
County of Mobile, ss:

Maurice White, of full age, being duly sworn according to law, upon his oath says:

That he is President of Mobile Gas Service Corporation, the petitioner herein, and that he is authorized by said petitioner to verify and file with the Federal Power Commission [fol. 97] this said petition; that he has carefully examined all the statements contained in said petition and that all of said statements and matters set forth therein in behalf of the petitioner are true and correct to the best of his knowledge, information and belief.

(S.) Maurice White.

Sworn and subscribed to before me this 16th day of July, 1953. (S.) Laura G. Finch, Notary Public, Mobile County, Alabama.

Before the Federal Power Commission

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

Before Jerome K. Kuykendall, Chairman; Nelson Lee Smith and Dale E. Doty, Commissioners.

In the Matter of United Gas Pipe Line Company

Order Permitting Intervention

On July 16, 17, and 20, 1953, Tyler Gas Service Company, of Tyler, Texas, Mobile Gas Service Corporation, and Mississippi Valley Gas Company, respectively, filed petitions to intervene in the above-entitled proceedings. No answers or protests to such petitions have been filed.

The Commission *finds*:

(1) Although the petitions were not filed within the time required by Section 1.8 of the Commission's Rules of Practice and Procedure, good cause exists to permit the filing. [fols. 98-100] (2) The participation of petitioners may be in the public interest.

The Commission *orders*:

The above-named petitioners be and they hereby are permitted to become intervenors in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, That the participation of such intervenors shall be limited to matter affecting asserted rights and interests specifically set forth in their petitions for leave to intervene; and *Provided, further*, That the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order of the Commission entered in this proceeding.

By the Commission. J. H. Gutride, Acting Secretary.

Adopted: August 12, 1953.

Issued: August 14, 1953.

[fol. 101] IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS, TYLER DIVISION

TYLER GAS SERVICE COMPANY, ET AL., Plaintiffs

versus

UNITED GAS PIPE LINE COMPANY, Defendant

Civil Action No. 1662

Thomas B. Rainey, of Tyler, Texas; and Bryan Rea, Jr., of Washington, D. C.; for Plaintiff Tyler Gas Service Company.

Troy Smith, of Tyler, Texas; for Plaintiff City of Tyler.

Thomas Fletcher, of Houston, Texas; for Defendant.

MEMORANDUM OPINION—December 29, 1953

The two plaintiffs seek the intervention of the equitable powers of this Court to restrain the defendant from filing a contemplated pleading in a proceeding now pending before the Federal Power Commission. Tyler Gas Service Company (Tyler Gas), a corporation chartered under the laws of this State, is a local natural gas distributing company, selling at retail to the resident of Tyler, Texas. The City of Tyler (City) is a municipal corporation likewise chartered under the laws of Texas, with a population of [fol. 102] some 40,000 persons. United Gas Pipe Line Company (United) is a Delaware corporation engaged in the transportation and sale of natural gas in interstate commerce for resale. As such, it is a "Natural-Gas Company" within the terms of the Natural Gas Act of 1938 (15 U.S.C.A. 717, et seq.).

Tyler Gas has been purchasing its gas from United since 1940 under the terms of a written contract and several amendments thereto. United has applied to the Federal Power Commission for an increase in rates considerably in excess of those presently in force, and this controversy results from efforts of Tyler Gas and City to restrain the impending institution of such proposed rate schedule.

The facts, which are largely without dispute, arise in the following fashion. The original contract between United

and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½¢ per thousand cubic feet (Mcf), for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with a proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these [fol. 103] facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the

event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in com- [fol. 104] pliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

About July 1, 1952, United filed with the Commission a schedule of rates [1] (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff, United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with its customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the

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[1] Referred to as "Conversion rates," as it served to convert United's schedule of rates from contract form to tariff form. Such a change in form was required by rules of the Commission.

conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

On June 24, 1953, United filed with the Commission another revision of its schedule of rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf; and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

Upon the filing of the new proposal, by order of July 10, [fol. 105] 1953 the Commission set a hearing for July 20, 1953 to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210; "In the Matters of United Gas Pipe Line Co.") in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until December 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4(e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expires December 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for sale of industrial gas; hence its effective date was fixed at July 25, 1953.

The initial hearing was held July 20, 1953, as scheduled. Some testimony was taken, and the hearing was then adjourned to be reconvened at a later date. At the present time, it has not been so reconvened. As it appears that United's entire rate structure throughout several states is at issue before the Commission, in all probability the final determination will be long delayed.

Thus plaintiffs say that, come December 25, 1953, United proposes, pursuant to said Section 4(e), to file its motion

as contemplated thereby, moving the Commission to permit the proposed schedule to go into effect; that on that date the five-month suspension period permitted the Commis- [fol. 106] sion by terms of the statute will have expired; and thereafter it will have no discretion but to permit the increase. While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is argued that this will simply retain the status quo until the Commission has time to act.

Federal jurisdiction exists by reason of diversity of citizenship and amount in controversy, as alleged. Having jurisdiction as well of the parties and subject matter, I pass to the main question, whether the plaintiffs have made a case calling for the exercise of the equitable powers of the Court. The briefs which have been filed by counsel for all parties have been most helpful in the consideration of this question. They fail to disclose any authority directly in point; but from the principles which are clearly established by the authorities I am convinced that the relief prayed for may not be granted.

It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. While it is no doubt an over-simplification of the problem, for present purposes it will suffice to say that the business of United is one charged with a public interest; hence, one in its position may not by private contract for future rates collect a rate which is found to be excessive, because such would be unfair to the consumer; neither may it bind itself to rates which are determined to be confiscatory, because to permit such utility to charge and collect rates which are confiscatory of its own property would jeopardize [fol. 107] its ability properly to serve the public in the future (Union Dry Goods Co. v. Georgia Pub. Serv. Co., 248 U. S. 372, and cases there cited).

Thus the rate-fixing provision of the United-Tyler Gas

contract, as well as many other provisions thereof, are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with the governmental regulation or with public policy, the former must yield (Colo. Interstate Gas Co. v. Fed. Power Comm., 142 Fed. (2d) 943, aff. 324 U. S. 581, and cases there cited). In such cases, compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise to a cause of action in favor of the other, either for money damages (Miss. Power & Light Co. v. Memphis Natural Gas Co., 162 Fed. (2d) 388) or for specific performance (Mich. Consol. Gas Co. v. Panhandle Pipe Line Co., 173 Fed. (2d) 784).

So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable—and hence lawful—is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates.

While I think it clear that the utility, despite its contract to the contrary, may apply to the appropriate governmental [fol. 108] agency for a review of its rate structure, it is equally clear that such utility may not, by purely unilateral action, and without pursuing the statutory method to secure review by the regulatory body, disregard its current contract rates and initiate higher ones (Southern Util. Co. v. City of Palatka, 268 U. S. 232). Plaintiffs contend that the action of United should be so characterized here, and that it should not, during the long interval while the Commission has the matter under consideration, be permitted to collect rates which the Commission has not approved, and which represent only United's own estimate of the rates which it would be just and reasonable for it to collect. The proposed sched-

ule actually is United's "asking price", and in all probability on final determination by the Commission will be whittled down substantially. The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates. United has followed the procedure prescribed by statute to secure this review, and if it files the motion which plaintiffs allege it contemplates, and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (Hope Nat. Gas Co. v. Fed. Power Comm., 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the Statute. Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service *shall* go into effect." (Emphasis added). It is not for this Court to add another proviso, reading "and where there is no private agreement or contract to the contrary".

[fol. 109] Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to give adequate relief.

The fact that the so-called "contract rates" a eed upon between the parties here at all times are subjec o the approval of, and to modification or change by, the Commission is illustrated by the institution of the new "conversion rates" directed by order of the Commission of July 31, 1953. While the change thus effected was not great dollar-wise, it nevertheless constituted a departure from the figures upon which the parties had agreed. Such new rates became the lawful ones by virtue of the order of the Commission mentioned above, and hence the provisions of the amended contract which purported to fix the rates for a long period of time in the future, and upon which plaintiffs base their claim for equitable relief, have not been in effect for a matter of several months. During that period when the contract rates were in fact the lawful ones, they became lawful not simply because the parties had agreed thereto. Such rates received

their vitality and breath of life from the fact that the Commission permitted such contract to be filed and ordered such rates into effect until further notice. By the order which accomplished this result (plaintiffs' Exh. 19), the Commission was careful to provide that such action should not "be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate".

Adopting the view as outlined above, and by reason of my desire to file this memoranda as soon as possible, I forego the consideration of a number of other questions presented by the pleadings. Among these are certain questions raised by the presence of the City of Tyler. The plaintiffs contend [fols. 410] that United was a party to a contract not only with Tyler Gas, but that its telegram of February 28, 1946, its letter of April 3, 1946 to the Commission of the City of Tyler, and its conduct throughout the period during which the City was negotiating with Tyler Gas concerning a renewal of its franchise, made out a contract as well between United and the City. While I would have difficulty spelling out all the elements of a contract between United and City, undoubtedly strong elements of estoppel may be invoked by City against United. It is undisputed that City was influenced in granting the renewal franchise to Tyler Gas by the assurances from United that it would sell to Tyler Gas for a long period of time at the 12c rate. But I think that the presence of City here as a plaintiff does not strengthen the case against United. If it could not, by virtue of its contract with Tyler Gas, preclude its own application to the Commission for a review of its rate structure, then it could not stop itself by reason of its conduct toward the City from taking the same action.

As I view the case, it is not necessary to determine the right of the City to enter into a contract (which United questions). Neither the Federal Power Commission nor many other persons enumerated by United are indispensable parties, whose presence would be required to confer jurisdiction on the Court. Having jurisdiction, I conclude that the plaintiffs do not show grounds for equitable relief, and the action will be dismissed for that reason.

Counsel were notified December 23, 1953 of this ruling. The Clerk will file the foregoing and furnish counsel a copy

thereof. This memoranda is adopted as Findings of Fact and Conclusions of Law under Rule 52.

Counsel for defendant will submit order within ten (10) days.

Done at Houston, Texas, this 29th day of December, 1953.

(S.) Ben C. Connally, Judge.

[fol. 110a] [File endorsement omitted.]

[fol. 111] Supplemental Appendix to Intervener's Brief—Filed May 6, 1954.

Original Contract.

This Agreement made and entered into as of the first day of January, 1936, by and between United Gas Public Service Company, a Delaware corporation, having a permit to do business in Alabama, hereinafter called "Seller," and Mobile Gas Service Corporation, an Alabama corporation, hereinafter called "Buyer."

Witnesseth: Whereas, Buyer owns a franchise for the distribution and sale of gas in the City of Mobile, Alabama and owns and operates a distribution system in said city and in the vicinity thereof, for the purpose of selling and distributing gas; and

Whereas, Seller has a supply of natural gas available for delivery to Buyer and Buyer desires to purchase natural gas from Seller for its entire requirements for sale and distribution in the City of Mobile, Alabama and in the contract area (as hereinafter defined) thereof, and Seller is willing to sell and deliver natural gas to Buyer for such purposes in the amounts and on the terms and conditions hereinafter provided;

Now, Therefore, in consideration of the mutual covenants and obligations herein contained, the parties hereto hereby covenant and agree as follows:

I

Subject to the terms, conditions and limitations hereinafter set forth, Seller agrees to sell and deliver or cause to

be delivered to Buyer and Buyer agrees to purchase and receive from Seller and pay Seller for (a) all natural gas [fols. 112-118] necessary to meet the requirements of the various consumers supplied or to be supplied by Buyer through its distribution system as now constructed and as the same may be hereafter extended, in the City of Mobile, Alabama, and in the contract area, as hereinafter defined, (b) lost and unaccounted-for gas and (c) all natural gas required by Buyer for its own use. The term "contract area," as herein used, is defined to mean (1) the entire territory included within the corporate limits of each of the municipalities of Mobile and Prichard, Alabama; (2) the entire territory included within a zone contiguous to and completely surrounding the corporate limits of the municipality of Mobile, Alabama, which zone shall be two miles in width in all directions from said corporate limits; and (3) all territory outside of the corporate limits of the City of Mobile and Prichard now being served by the Buyer, including the following villages and or unincorporated towns, whether being served or not; Spring Hill, Crichton, Toulminville, Plateau, Magazine Point, Chickasaw, and Whistler.

[fol. 119] VI

The prices to be paid by Buyer to Seller for natural gas delivered hereunder, during the period commencing at seven o'clock (7:00) A.M., on the first day of January, 1936 and ending at seven o'clock (7:00) A.M., on the 15th day of September, 1945, shall be as follows:

A—Domestic Gas

For natural gas sold and delivered by Seller to Buyer for distribution and sale to its domestic customers (as said term is hereinafter defined):

For the first two thousand (2,000) cubic feet per active domestic meter per month, forty-five cents (45¢) per one thousand (1,000) cubic feet.

For all over two thousand (2,000) cubic feet per active domestic meter per month, thirty-five cents (35¢) per one thousand (1,000) cubic feet.

By the term "active domestic meter," as used herein, is meant (for any month) any meter through which any

domestic customer shall have taken gas from Buyer during such month and has been billed for such gas by Buyer.

B—Industrial Gas

For natural gas sold and delivered by Seller to Buyer for distribution and sale to its industrial customers:

For gas sold under fifteen cents (15¢) net per one thousand (1,000) cubic feet, eighty-six and two-thirds per cent (86⅔%) of the net selling price.

For all gas sold at	15¢	net per 1,000 cubic feet,	13¢ per MCF
"	15.5	"	13.375¢ "
"	16.0	"	13.75 "

[fol. 120]

"	16.5	"	14.125 "
"	17.0	"	14.50 "
"	17.5	"	14.875 "
"	18.0	"	15.25 "
"	18.5	"	15.625 "
"	19.0	"	16.00 "
"	19.5	"	16.375 "
"	20.0	"	16.75 "
"	20.5	"	17.075 "
For all gas sold at	21.0¢	net per 1,000 cubic feet,	17.4¢ per MCF
"	21.5	"	17.725 "
"	22.0	"	18.05 "
"	22.5	"	18.375 "
"	23.0	"	18.7 "
"	23.5	"	19.025 "
"	24.0	"	19.35 "
"	24.5	"	19.675 "
"	25.0	"	20.0 "
"	25.5	"	20.2 "
"	26.0	"	20.4 "
"	26.5	"	20.6 "
"	27.0	"	20.8 "
"	27.5	"	21.0 "
"	28.0	"	21.2 "
"	28.5	"	21.4 "
"	29.0	"	21.6 "
"	29.5	"	21.8 "
"	30.0	"	22.0 "
"	30.5	"	22.15 "
"	31.0	"	22.3 "
"	31.5	"	22.45 "

For all gas sold at	21.0c net per 1,000 cubic feet,	17.4c	per MCF
"	32.0 "	22.6	"
"	32.5 "	22.75	"
"	33.0 "	22.9	"
"	33.5 "	23.05	"
"	34.0 "	23.2	"
"	34.5 "	23.35	"

[fol. 121]

"	35.0 "	23.5	"
"	35.5 "	23.65	"
"	36.0 "	23.8	"
"	36.5 "	23.95	"
"	37.0 "	24.1	"
"	37.5 "	24.25	"
"	38.0 "	24.4	"
"	38.5 "	24.55	"
"	39.0 "	24.7	"
"	39.5 "	24.85	"
"	40 and over "	25.0	"

For all gas sold to industrial customers, (exclusive of commercial heating customers) using under one hundred thousand (100,000) cubic feet for any single customer in any one month, thirty (30) cents per thousand (1,000) cubic feet.

In determining the price at which gas is sold by Buyer to its industrial customers all demand charges (but no minimum bill nor service charges nor forfeited discounts) shall be proportioned over the gas sold in each rate block and the net sale price so determined for each rate block for each customer shall fix and determine the price to be paid by Buyer to Seller for the quantities sold by Buyer to each industrial customer in each rate block in accordance with the above schedule. For gas sold by Buyer to its industrial customers at net rates intermediate between those shown in the above schedule the price shall be deemed to be the nearest price shown in the above schedule.

In consideration of the schedule of rates to be paid by Buyer to Seller as above provided, it is agreed that Buyer shall not contract to sell any natural gas at a step in the rate of less than twenty (20) cents per thousand (1,000) cubic feet without the consent in writing of Seller.

[fol. 122] C—Unaccounted for Gas

For all unaccounted-for gas twenty-three (23) cents per thousand (4,000) cubic feet.

D—Definitions

The term "domestic customer" is defined to mean any single consumer using natural gas in any place for any purpose in an amount up to but not exceeding fifty thousand (50,000) cubic feet in any month and the purchase price for natural gas for domestic customers hereby established shall apply to all natural gas used by such consumer during each month.

The term "industrial customer" is defined to mean any single consumer using natural gas in any place for any purpose in an amount exceeding fifty thousand (50,000) cubic feet in any month and the purchase price for natural gas for industrial customers hereby established shall apply to all natural gas used by such consumer during each month; provided, however, that any single consumer using natural gas for commercial heating in an amount less than fifty thousand (50,000) cubic feet in any month shall be considered an "industrial customer," as herein defined, for all purposes.

The term "unaccounted-for gas" is defined to mean the difference between the quantity of natural gas sold and delivered by Seller to Buyer and the quantity of natural gas Buyer delivers through its pipe lines to its domestic and industrial consumers.

If at any time during the term hereof the natural gas delivered hereunder shall average for a period of thirty (30) days a heating value of less than 900 BTU per cubic foot of dry gas corrected to the unit of measurement provided in Article V hereof, then in such event the price to be paid for natural gas having such less heating value than 900 Btu per cubic foot thereafter delivered shall be fixed by mutual agreement of the parties hereto, and, in the [fol. 123-132] event the parties hereto fail to agree, such price shall be determined by three arbitrators who shall be chosen, and who shall function, and whose decisions shall be

binding upon the parties hereto in all respects as hereinafter provided in this Article VI.

The price to be paid by Buyer to Seller for natural gas delivered hereunder during the period commencing at seven o'clock (7:00) A.M. on the 15th day of September, 1945 and continuing until the termination of this agreement, shall be subject to the mutual agreement of the parties hereto, and if not so agreed to by the parties hereto at least six (6) months prior to the 15th day of September, 1945, said rates for natural gas deliverable hereunder during the remainder of the contract period shall be determined by a board of three arbitrators to be selected as follows:

[fol. 133-134] SUPPLEMENT No. 7

THIS AGREEMENT made and entered into this 17th day of October, 1941, by and between United Gas Pipe Line Company, a Delaware corporation, and Mobile Gas Service Corporation, an Alabama corporation,

WITNESSETH:

[fol. 135] 2

All of Article VI of said contract of January 1, 1936, shall be and is hereby eliminated from said contract from and after the effective date hereof, and there shall be and is hereby substituted in lieu of said Article VI of said contract the following new Article VI, to-wit:

"VI

During the period of this agreement beginning on July 1, 1941 and ending July 25, 1947, the price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder shall be as follows:

[fol. 136] (A) Domestic Gas:

For all gas delivered by Seller to Buyer for resale and distribution to Buyer's domestic consumers thirty cents (30c) per thousand cubic feet.

The amount of domestic gas delivered hereunder during

any month (being the gas to which the above mentioned rate is applicable) shall be the total volume of gas billed for such month by Buyer to its residential consumers plus the total volume of gas billed for such month by Buyer to its commercial and other consumers whose individual average rate from Buyer for such month is thirty seven and one-half cents (37½¢) or more per thousand cubic feet.

(B) Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial consumers, eighty per cent (80%) of the proceeds received or receivable by Buyer therefor from each such industrial consumer without deduction for unpaid accounts; provided, however, that Seller shall receive not less than sixteen cents (16¢) per thousand cubic feet for each thousand cubic feet of such gas except in such cases, if any, as Seller may consent in writing to a lesser amount.

All gas sold by Buyer to its consumers, except domestic gas as defined above, and except special industrial gas as hereinafter defined, shall be classified as industrial gas, to which the rates provided in this Subdivision (B) shall apply.

[fols. 137-138] (C) Special Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial customers whose annual fuel requirements are in excess of five hundred million (500,000,000) cubic feet of gas, and to industrial customers to whom delivery of gas is made by Buyer through separate facilities not a part of Buyer's general distribution system, ninety per cent (90%) of the proceeds received or receivable by Buyer therefor from each such special industrial customer without deduction for unpaid accounts; provided, however, that Seller shall receive not less than sixteen cents (16¢) per thousand cubic feet for each thousand cubic feet of such gas except in such cases, if any as Seller may consent in writing to a lesser amount.

[fol. 139] In computing the amounts received or receivable by Buyer under Subdivision (B) above, all demand charges (but not minimum bills, service charges, forfeited discounts, receipts from tax adjustment clauses, etc.) shall be included.

In computing the amounts received or receivable by Buyer under Subdivision (C) above, all demand charges, minimum bills, service charges and forfeited discounts shall be included.

Any tax received or receivable by Buyer through the medium of a valid tax adjustment clause in its rate schedules which by agreement between the parties hereto is to be collected for Seller shall be paid to Seller, and the Buyer shall retain any taxes collected for its benefit.

If at any time during the term hereof the natural gas delivered hereunder shall average for a period of thirty (30) days a heating value of less than 900 Btu per cubic foot of dry gas corrected to the unit of measurement provided in Article V hereof, then in such event the price to be paid for natural gas having such less heating value than 900 Btu per cubic feet thereafter delivered shall be fixed by mutual agreement of the parties hereto, and, in the event the parties hereto fail to agree, such price shall be determined by three arbitrators who shall be chosen, and who shall function, and whose decisions shall be binding upon the parties hereto in all respects as hereinafter provided in this Article VI.

The price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder during each succeeding five (5) year period of this agreement, after the expiration of the first period hereof ending July 25, 1947, shall be determined by agreement between the parties not less than twelve (12) months prior [fols. 140-145] to the beginning of each of such five-year periods and failing so to agree the determination of the price shall be submitted to arbitration as hereinafter in this article provided.

In the event no price has been agreed upon within twelve (12) months prior to the beginning of any five-year period to which the price is to apply, such price shall be determined in the following manner:

[fol. 146] SUPPLEMENT No. 9

This Agreement made and entered into this the 30th day of July, 1946, by and between United Gas Pipe Line Company, a Delaware corporation, hereinafter called "Seller"

and Mobile Gas Service Corporation, an Alabama corporation, hereinafter called "Buyer."

Witnesseth:

1.

Effective as of January 1, 1947 at seven o'clock (7:00) A. M.; Subdivisions (B) and (C) of Article VI of said contract of January 1, 1936, as heretofore supplemented and amended, shall be and are hereby changed and amended so that said Subdivisions shall, in their entirety, thereafter read as follows:

[fol. 147] "(B) Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial customers whose fuel requirements during the billing month in question are not more than 41,667,000 cubic feet of gas, eighty per cent (80%) of the proceeds received or receivable by Buyer therefor from each such industrial customer during such billing month, without deduction for unpaid accounts; provided, however, that Seller shall receive not less than 16c per one thousand (1,000) cubic feet for each one thousand (1,000) cubic feet of such gas except in such cases, if any, as Seller may consent in writing to a lesser amount.

All gas sold by Buyer to its customers, except domestic gas as defined above, and except special industrial gas as hereinafter defined, shall be classified as industrial gas, to which the rates provided in this Subdivision (B) shall apply."

"(C) Special Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial customers whose fuel requirements during the billing month in question are in excess of 41,667,000 cubic feet of gas:

(1) Eighty per cent (80%) of an amount determined by multiplying the total amount of proceeds received or receivable by Buyer from each such special industrial customer during such billing month, without deduction for unpaid accounts, by a fraction, the

numerator of which shall be 41,667,000 and the denominator of which shall be the total number of cubic feet of gas delivered to such customer during such [fols. 148-152] billing month; and

(2) Ninety per cent (90%) of an amount determined by multiplying the total amount of proceeds received or receivable by Buyer from each such special industrial customer during such billing month, without deduction for unpaid accounts, by fraction, the numerator of which shall be the total number of cubic feet of gas delivered to such customer during such billing month minus 41,667,000, and the denominator of which shall be the total number of cubic feet of gas delivered to such customer during such billing month;

provided, however, that Seller shall receive not less than 16c per thousand cubic feet for each one thousand (1,000) cubic feet of such gas except in such cases, if any, as Seller may consent in writing to a lesser amount."

[fol. 153] SUPPLEMENT NO. 10 TO SUPPLEMENT NO. 7

Mobile Gas Service Corporation
P. O. Box 1130
Mobile 6, Alabama

June 28, 1946.

United Gas Pipe Line Company,
Shreveport, Louisiana.

GENTLEMEN:

We are purchasing natural gas from you for resale and distribution in the City of Mobile, Alabama, and in the territory immediately adjacent thereto under provisions of a contract dated January 1, 1936, between United Gas Public Service Company (to whose rights thereunder you have succeeded) and this Company, as amended by agreement dated October 17, 1941, between you and this Company.

Under the provisions of subdivision C of Article VI of said contract as amended, we are required to pay you for gas delivered to us for resale to special industrial consumers 90% of the proceeds received or receivable by us therefor from each such special industrial consumer without deduc-

tion for unpaid accounts; provided, however, that you shall receive not less than 16c per thousand cubic feet for each thousand cubic feet of gas except in cases where you may consent in writing to a lesser amount.

We have agreed to sell natural gas to Ideal Cement Company (referred to in this letter as Customer) for a period beginning upon the date gas is first delivered thereunder and ending ten years from and after the date upon which the delivery of gas is commenced, under either Rate Schedule B or Optional Rate Schedule SR-M #1, as hereinafter set out, which rates are such that the payment to you of 90% of proceeds received by us for gas delivered to Customer may result in the payment to you of less than 16c per thousand cubic feet for the gas delivered by you to us for resale to Customer. Said rate schedules are as follows, to-wit:

[fol. 154] Rate Schedule "B"

20.0c per MCF for the first one million cubic feet used each month;
18.0c per MCF for the next one million cubic feet used each month;
16.0c per MCF for the next twenty-eight million cubic feet used each month;
14.0c per MCF for all additional gas used each month.

The prices above set forth are subject to adjustment for BTU and for taxes, and subject to the payment of an annual minimum of $12,000.00, all as specifically provided for in said contract.

Optional Rate Schedule SR-M #1

15.0c per MCF when total deliveries are between 0 and 85,000 MCF per month;
14.0c per MCF when total deliveries are between 85,001 and 125,000 MCF per month;
13.0c per MCF when total deliveries are between 125,001 and 160,000 MCF per month;
12.0c per MCF when total deliveries are between 160,001 and 400,000 MCF per month;
11.5c per MCF when total deliveries are over 400,000 MCF per month.

The prices above set forth are subject to adjustments for BTU and for taxes, and subject to the payment of an annual minimum of $90,000.00, all as specifically provided for in said contract.

If and so long as the Rate Schedule B is applicable to said customer, we request that you agree to accept, so long as the Customer continues as a special industrial customer, 90% of the proceeds received by us from said Customer even though 90% of such proceeds may amount to less than 16c per thousand cubic feet for such gas, for all gas delivered by [fol. 155] you to us (during the period in which such Rate Schedule B is applicable to said Customer) and sold by us to said Customer under Rate Schedule B. If at any time during which said Rate Schedule B is applicable to said Customer, this Customer ceases to be a special industrial customer, but continues to use gas under said Rate Schedule B, we request that you agree to accept 80% of the proceeds received or receivable by us, without deduction for unpaid accounts, including all demand charges, but excluding minimum bills, service charges, forfeited discounts, receipts from tax adjustment clauses, etc., even though 80% of such proceeds may amount to less than 16c per thousand cubic feet for such gas. It is agreed that in computing the amounts received by us from said Customer under the above mentioned contract, during the period of time when said Rate Schedule B is applicable to said Customer and so long as the Customer continues as a special industrial customer, there shall be included all minimum charges, readiness-to-serve charges and any other charges made by us under said contract. The provisions of this particular paragraph are applicable only during the periods of time when said Rate Schedule B is applicable to said Customer.

If and so long as the Optional Rate Schedule SR-M #1 is applicable to said Customer, we request that you agree to accept 90% of the proceeds received by us from said Customer, even though 90% of such proceeds may amount to less than 16c per thousand cubic feet for such gas, for all gas delivered by you to us (during the period during which Optional Rate Schedule SR-M #1 is applicable to said Customer) and sold by us to said Customer under Optional Rate Schedule SR-M #1. It is agreed that in computing the amounts received by us from said Customer under the

above mentioned contract during the period that Optional Rate Schedule SR-M #1 is applicable to said Customer, there shall be included all minimum charges, readiness to serve charges, and any other charges made by us under said contract. The provisions of this particular paragraph are applicable only during the periods of time when said Op-
[fol. 156] tional Rate Schedule SR-M #1 is applicable to said Customer.

It is further agreed that the Customer become delinquent for sixty days or more in the payment of any bill due us, we will forthwith notify you of such delinquency and we will, upon request from you, immediately exercise our rights under our contract with said Customer and discontinue service and will use all diligence in attempting to collect the amounts due us.

We agree, if during the term of our contract with Customer the existing rate of any tax (as hereinafter defined) be increased or if any new tax be imposed, that we will, upon notice from you, use every reasonable means to collect said increase or new tax from Customer as contemplated in said contract, and will, to the extent collected from Customer, reimburse you for the increased amount paid by you for such increased or new tax on the gas delivered by you to us for resale to said Customer; and we will make similar reimbursements to you for each additional increase in any new tax hereafter imposed, paid by you on said gas, upon your furnishing us such proof of the validity of our reimbursing you therefor as may be required by any regulatory or other body having jurisdiction thereover.

If the rate of any such tax (except and other than the Louisiana State gas gathering tax imposed for a limited period under Act 132 of the Louisiana Legislature, regular session of 1944, effective on August 1, 1944) be decreased, you will credit us with the saving effected by you on such gas by virtue of such decrease.

We agree, upon being furnished by you periodically with a statement showing the amount of the increased tax paid by you during such period, to make payment to you of the amount of such increased tax as shown by said statement and as collected by us from the Customer.

It is agreed, however, that in the event the total amount of the increase in the tax on you plus any increase in the

[fol. 157] tax on our Company, as contemplated in our contract with Customer, is in excess of the amount which we are permitted, under Section VII of our contract with Customer to charge said Customer, then the portion of the increased tax on you, for which we will reimburse you, will be that proportionate part of said maximum amount we are permitted to collect from Customer, and do so collect, which the amount of the increase in the tax on you bears to the total amount of the increase in the taxes on you and our Company. For example: If any tax on you is increased three-fourths of one cent, and a tax on our Company is increased one-half of one cent, then we will reimburse you for three-fifths of one cent: Provided, however, that if as a result of such reisbursement you would receive less than 100% of the amount of such increased tax on you, you shall have the right, upon giving us 30 days notice in writing, to require us to cancel said contract with Customer; provided, further, however, that we may, at our election, continue our said contract with Customer in force by reimbursing you for 100% of the amount of the increased tax on you.

June 28, 1946.

We further agree that if our above-mentioned agreement to reimburse you be not approved by any regulatory or other body having jurisdiction thereover, after any such increase of taxes on you, then you may require us to cancel our contract with Customer by giving us 60 days written notice.

As used herein, the term "tax" shall mean any tax, license, fee or charge levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is based on the volume or value of the gas in question; and for the purpose of determining the reimbursement to be made by us to you, or the credit to be given by you to us hereunder in respect of taxes paid by you on such gas, any tax paid by any subsidiary or affiliate of your company and any tax which you, [fol. 158] under contractual obligation, refund to the person or company paying same, shall be considered to be paid by you.

If you agree, subject to the terms and provisions hereof,

that we shall pay you and you shall accept 90% of the proceeds received by us from customer, even though 90% of such proceeds may amount to less than 16¢ per thousand cubic feet of gas, for all gas delivered by you to us during the period hereinabove specified and sold by us to Customer under either of the rate schedules above set out, and if the other matters referred to herein are acceptable to you, please sign this letter in duplicate, returning a copy for our files, thereby constituting this letter an agreement between us.

Subject to our obtaining the approval of the Federal Power Commission, the foregoing is Agreed to and accepted this 30th day of July, 1946. United Gas Pipe Line Company, by M. A. Abernathy.

Yours very truly, Mobile Gas Service Corporation, by Maurice White, President.

[fol. 158a] [File endorsement omitted]

[fol. 159] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOBILE GAS SERVICE CORPORATION, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

PETITION TO REVIEW AND SET ASIDE ORDER AND ORDER OF THE FEDERAL POWER COMMISSION—Filed March 9, 1954

To the United States Court of Appeals for the Third Circuit and the Honorable Justices thereof:

Mobile Gas Service Corporation* herewith respectfully

* Herein sometimes called "Mobile" or petitioner.

petitions this Court to review the opinion and order of the Federal Power Commission** issued December 7, 1953

** Herein sometimes called "Commission" or respondent.

in Docket No. G-2227, entitled "In the Matter of Mobile Gas Service Corporation." The opinion and order is printed in the Appendix hereto (App. p. 1).

The Issue Presented

The issue sought to be reviewed can be simply stated: Does the Natural Gas Act render a duly filed contract for the purchase of natural gas at agreed rates for a term of years void *ab initio*, or merely voidable upon a finding that the contract contravenes the public interest?

[fol. 160] The Nature of the Administrative Proceedings Sought to Be Reviewed

Mobile is seeking review of an order of the Commission pursuant to which it has been deprived of its rights under a duly filed contract for the purchase of natural gas at an agreed rate over its objection and without any hearing or determination that the public interest required that the contract be abrogated.

Mobile is a public utility under the laws of Alabama distributing and selling natural gas to consumers in Mobile, Alabama and the surrounding communities and areas. Much of Mobile's business is in the resale of natural gas to industrial customers. It purchases its entire supply of gas for these resales from United Gas Pipe Line Company,* a natural gas company within the meaning of the Natural Gas Act (52 Stat. 821, 15 U.S.C., §717a(6)).

Mobile's purchases of gas from United are made pursuant to a contract entered into between Mobile and a predecessor to United in January, 1936, as modified by later agreements between Mobile and United in October, 1941 and July, 1946. These agreements as modified provide that for gas for resale to industry Mobile will pay United certain percentages of Mobile's proceeds from the resales, but in any event not less than 16c per MCF of gas unless United has agreed in writing to accept less than 16c. These contracts were filed with the Federal Power Commission as United's Gas Rate Schedule FPC No. 20 and Supplement Nos. 7 and 9 thereto.

In 1946 Mobile proposed to contract with Ideal Cement Company to supply it with natural gas for a period of ten years at a fixed rate of 12c per MCF. Mobile advised United of this proposal and requested that it accept the

* Herein sometimes called "United."

percentage of Mobile's proceeds from the resales to Ideal [fol. 161] provided for in its contract with Mobile even though this percentage would return United less than 16¢ per MCF, the minimum rate to which it was entitled by that contract.

On July 30, 1946 United agreed in writing to Mobile's request, and in reliance on this agreement by United, Mobile entered into the contract to supply gas to Ideal at 12¢ per MCF for ten years.* This contract was expressly approved by the Alabama Public Service Commission, and United's agreement to accept less than 16¢ per MCF for gas sold to Mobile for resale to Ideal * was duly filed with the Federal Power Commission as Supplement No. 10 to United's Gas Rate Schedule FPC No. 20, thus becoming the legal rate for such sales.

The percentage rates which United thus agreed to accept resulted in payments by Mobile to United at an actual rate of 10.7¢ per MCF for the gas which United supplied for resale to Ideal. In May, 1952 United replaced its percentage rates on file with the Federal Power Commission with its FPC Gas Tariff Original Volume No. 1, which substituted a flat rate of 10.7¢ per MCF for gas sold to Mobile for resale to Ideal. For the percentages provided for under the original United-Mobile-Ideal agreement. United informed Mobile that this filing was made in order to comply with a Commission requirement that all its rates be converted from a percentage basis to a dollars and cents basis.

Thus United's sales of gas to Mobile at 10.7¢ per MCF for resale to Ideal at 12¢ per MCF continued pursuant to the United-Mobile-Ideal contract until June 24, 1953. On that day United filed with the Commission a number of proposed increases in its rates for certain town border sales, including First Revised Sheet No. 40 and Second Revised Sheet No. 39 to its Gas Tariff Original Volume No. 1, which provided for an increase from 10.7¢ to 14.5¢ per MCF in the rate to Mobile for resales to Ideal. The [fol. 162] Commission on July 10, 1953 issued an order

* Herein sometimes referred to as the United-Mobile-Ideal contract.

which stated, in part, that these increased rates and charges "* * * have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful'" and ordered these rates suspended pending a hearing as to their lawfulness. However, since Section 4 (e) of the Natural Gas Act prohibits the suspension of proposed increased rates for sales for resale for industrial use only, the Commission's order did not suspend the new rate to Mobile, but expressly permitted it to go into effect on July 25, 1953. Thus Mobile has been compelled since that date to pay 14.5¢ per MCF to United for gas which it is obligated to resell to Ideal Cement Company for 12¢ per MCF. The proceeding involving all of these rate increases sought by United was denominated Docket G-2210 by the commission and was ordered consolidated with a number of other proceedings already pending dealing with United's rates and charges.

In response to United's attempt to substitute this 14.5¢ rate to Mobile for the 10.7¢ rate agreed upon in their contract, Mobile, on August 4, 1953, filed its petition protesting United's action and asserting its contract rights.* Mobile contended that United could not, unilaterally and without Mobile's assent, abrogate the contract between them *by the mere filing of an increased rate;* that the contract was binding and effective unless and until the Commission found after a hearing that the contract was so unreasonable that the public interest required that it be abrogated. In its petition Mobile requested that United's filing of this increased rate be rejected by the Commission

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* Mobile's petition was originally filed in the pending consolidated proceeding, Document G-2210, *et al.* However, since Mobile's motion for permission to intervene in that proceeding had not been granted at the time of the filing, and since it was apparent that immediate relief could not be obtained in Docket G-2210, the petition was amended so as to request the assignment of a separate docket number. This request was granted and Mobile's petition was assigned Docket G-2227, which is the docket in which the order herein appealed from was issued. This proceeding was never ordered consolidated with the proceedings in Docket G-2210, *et al.*

[fol. 163] as unlawful. It also prayed that if the Commission would not reject United's filing it (a) order a hearing solely as to the lawfulness of United's filing of the increased rates and charges in violation of its contract with Mobile and (b) that it enter an order directing that United refund any portion or all of the increased rates or charges collected from Mobile (1) if the filing by United is unlawful or (2) if these rates are ultimately found to be unlawful.

United, on September 11, 1953, petitioned to intervene in this proceeding and interposed an answer to Mobile's petition in which it opposed all of the relief requested by Mobile and asserted, in substance, that its contract with Mobile was not binding or enforceable as against United's mere filing of the higher rate. On September 28th Mobile filed its reply to United.

Thereafter, no hearings or other proceedings took place in the matter (Docket G-2227) until on December 7, 1953 the Commission issued the order and opinion which is the subject of this Petition to Review.

That order is set out in full in the Appendix and therefore will not be repeated fully here (App. p. 1). Suffice it to say that the opinion and order deny all of the relief requested by Mobile and order the proceeding terminated and Mobile's petition dismissed. The Commission refuses to reject United's filing of the increased rate and says that the filing is proper and lawful and that rate increases may be initiated by a natural gas company only pursuant to Section 4 of the Natural Gas Act. The Commission thus holds in effect that a duly filed rate contract, such as that here in issue, is void *ab initio*.

The Commission likewise refuses to order United to refund the increased amounts collected from Mobile if the filing is illegal or if the increased rate is found to be unlawful. This relief is denied Mobile on the ground that because [fol. 164] the Commission is specifically prevented by the proviso in Section 4 (e) of the Natural Gas Act from ordering the suspension of rates for resale for industrial use only it is also without authority to order a refund in the case of such rates.

Finally, the Commission states that questions relating to the reasonableness of United's proposed increase in

rates and charges are already at issue in other pending proceedings and refuses to order a separate hearing solely as to the unlawfulness of United's filing. The Commission indicates that Mobile could be heard in Docket G-2210, but that proceeding deals only with the reasonableness of the proposed new rates, and not with the question of the reasonableness of United's existing contract. Thus Mobile is at one and the same time deprived of its contract rights and required to pay a confiscatory rate, without any finding or determination whatsoever that its existing contract with United is against the public interest. It is subjected to this action peremptorily, without a hearing and without even the protection of a bond or a refund order.

Being aggrieved by the Commission's order issued December 7, 1953 Mobile on January 6, 1954 filed with the Commission its petition for a rehearing. This petition was denied by the Commission in its order issued February 4, 1954*

Jurisdiction and Venue

The statute upon which venue and jurisdiction in this case are based is Section 19(b) of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 831; 15 U.S.C. 717r (b)), the pertinent part of which reads as follows:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [fol. 165] circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

United is a natural-gas company organized and existing under and by virtue of the laws of the State of Delaware and thus is located in the Third Circuit within the meaning

* This order is reprinted at page 8a in the Appendix.

of Section 19(b) of the Natural Gas Act. The facts upon which jurisdiction is based are briefly stated. United is a natural-gas company within the meaning of the Natural Gas Act and is subject to the jurisdiction of the Commission. Mobile, the petitioner, is a party to the proceedings before the Commission wherein the Commission issued the order and opinion of December 7, 1953 hereinabove referred to relating to United, and Mobile is aggrieved by that order, since it is thereby deprived of its contract rights without a hearing, and is compelled to pay 14.5¢ per MCF for gas which it is obligated to resell for 12¢ per MCF. Within thirty days after the date of the order Mobile, pursuant to Section 19(a) of the Natural Gas Act, filed with the Commission its petition for rehearing. This application for rehearing of the Commission's opinion and order was denied by Commission order issued February 4, 1954 (App. p. 8a) and thus denied within the meaning of Section 19 of the Natural Gas Act. It is therefore apparent from the action by the Commission that this petition to review is filed within the sixty day period fixed by Section 19(b) of the Act.

[fol. 166] Grounds Upon Which Relief Is Sought

1. The Commission erred in refusing to reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 in so far as they apply to sales by United to Mobile for resale to Ideal. A rate contract which has been duly filed with the Federal Power Commission is not void *ab initio*, but is a valid, binding and enforceable contract until and unless modified or abrogated after a hearing and finding by the Commission that it is so unreasonable or otherwise so burdensome that the public interest requires that it be abrogated or modified. Such a contract rate cannot be repudiated by a mere *ex parte* filing under Section 4 of the Act of a proposed higher rate by one party to the contract. Such a filing, being unlawful and unauthorized by the Act, should be rejected, and the Commission's refusal to reject it has deprived Mobile of its property and rights without due process of law.

2. Having refused to reject the filing, the Commission erred in refusing to modify and amend its order of July

10, 1953 so as to provide for a hearing solely as to the lawfulness of the filing by United of the said revised sheets. The reason given by the Commission for such refusal; that all questions relating to the reasonableness of United's proposed new rates were pending before it in another proceeding affords no relief to Mobile, inasmuch as the only matters before the Commission in that proceeding are the reasonableness of such new rates, as distinguished from the reasonableness of Mobile's contract with United. If such new rates are found by the Commission to be reasonable, they will become the legal and effective rates, even though Mobile's contract may itself be perfectly reasonable. The effect of this refusal, therefore, is to deprive Mobile of any opportunity at any time to test the [fol. 167] lawfulness and reasonableness of its existing contract, and to compel it to pay a rate in excess of the contract rate without an opportunity to be heard.

3. The Commission erred in refusing to order that United make refund to Mobile of any portion or all of the increased rate collected from Mobile which may be determined to be illegal or to be unjust and unreasonable. As a result of this refusal by the Commission, Mobile may be compelled to pay rates which will later be found to be illegal, unjust or unlawful, without any opportunity to recover the same at any time, and to pay such rates before there has been any hearing or determination that they are legal, just or reasonable. Such a result is a deprivation of Mobile's property and rights without due process of law.

4. The Commission erred in dismissing Mobile's petition herein and in terminating the proceeding. Such dismissal and termination deprives Mobile of any opportunity to be heard as to its rights under its contract.

Conclusions

Wherefore, Petitioner prays:

1. That a copy of this petition be served forthwith upon a member of Respondent, Federal Power Commission, in accordance with Section 19(b) of the Natural Gas Act;

2. That Respondent, Federal Power Commission, be required, in conformity with Section 19(b) of the Natural

Gas Act and Rule 18(7) of this Court, to certify and file with this Court a transcript of the record upon which the order and opinion here sought to be reviewed were entered;

3. That petitioner be notified by the Clerk of this Court when said transcript has been received;

[fol. 168] 4. That this Court review the Commission's opinion and order issued December 7, 1953 and upon such review (a) reverse and set aside the said opinion and order; (b) order that the Commission reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39; (c) and order that United be directed to refund to Mobile with interest all rates and charges collected by it from Mobile in excess of 10.7¢ per MCF for sales of natural gas for resale to Ideal.

5. That this Court exercise jurisdiction over the parties and subject matter of this petition and grant to petitioner such other and further relief as the rights and equities of the cause may require and as to the Court may seem just in the premises.

Respectfully submitted, Mobile Gas Service Corporation, by Winthrop, Stimson, Putnam & Roberts, Its attorneys: (S.) William C. Chanler, a member.

Winthrop, Stimson, Putnam & Roberts, Johnston, McCall & Johnston, Counsel for Mobile Gas Service Corporation.

Dated: March 8, 1954.

[fols. 169-178] *Duly sworn to by William C. Chanler, March 8, 1954. Jurat omitted in printing.*

[fol. 179] [File endorsement omitted]

[fol. 180] IN UNITED STATES COURT OF APPEALS

[Title omitted]

MOTION OF UNITED GAS PIPELINE COMPANY TO INTERVENE IN OPPOSITION TO THE PETITION FOR REVIEW—Filed March 16, 1954

To the United States Court of Appeals for the Third Circuit and the Honorable Justices Thereof:

United Gas Pipe Line Company (United) respectfully moves this Court for permission to intervene herein in opposition to the petition for review of Mobile Gas Service Corporation, Petitioner, and in support of the correctness and binding effectiveness of the orders of the Federal Power Commission sought to be attacked herein, and as required by Rule 18(6) of the Rules of this Court, shows as follows:

Nature of United's Interest

1. United is a natural gas company subject to the jurisdiction of Respondent under the Natural Gas Act, and the matters and issues sought to be raised herein by Petitioner involve United's rights, powers, and duty to Respondent, and Respondent's power, authority, and jurisdiction of matters confided to its administrative regulation by the Natural Gas Act, including the terms, conditions, and provisions of service and sale of natural gas by United to Petitioner, which service and sale is made pursuant to the provisions of the Natural Gas Act subject to the regulation of Respondent.

2. On or about January 1, 1936, United Gas Public Service Company, a predecessor of United, contracted with Petitioner respecting sale of natural gas, which contract, in [fol. 181] Article XV, among other things, provided:

> "All of the obligations of the parties hereunder shall be subject to the valid orders of all governmental bodies, both Federal and State, having lawful jurisdiction in the premises."

United succeeded to the rights, powers, and obligations of United Gas Public Service Company in said contract, which

was from time to time amended and supplemented, all of which, being subject to the jurisdiction of Respondent under the Natural Gas Act, have been filed with Respondent as required by its Rules and Regulations and permitted by Respondent to become effective, including the supplement or amendatory agreement particularly asserted by Petitioner dated June 28, 1946, filed with Respondent as Supplement 10 to Supplement 7 of United's Gas Rate Schedule FPC No. 20, United's signature to the last supplement being expressly conditioned upon the approval of Respondent.

3. Said contract as amended and supplemented was in all things superseded by United's filing on or about 3 July, 1952, of its Federal Power Commission Gas Tariff converting said contract into tariff form as required by the Rules and Regulations of Respondent, which conversion tariff, together with the service agreement supporting the same, was permitted to be filed by Respondent and thus became the only lawful basis for service and the rates and charges [fol. 182] to be made therefor lawfully chargeable by United to Petitioner for such service and sales covered by the said Tariff. Petitioner did not appeal from the Commission's order permitting the filing, which became final and was and is binding and conclusive upon United and Petitioner.

4. On 24 June, 1953, United filed with Respondent an application for increase of rates and charges covering certain town border sales and certain sales for resale to large industrial consumers, which would be inclusive of the gas alleged to be resold by Petitioner to Ideal Cement Company. This application was accepted for filing and docketed as Docket G-2210 on Respondent's docket by the order of July 10, 1953, mentioned in the petition, the increased rates for resale to industrial consumers were permitted to become effective without suspension as required by the basic Act, while all other proposed increases were suspended for the statutory five months period; and said Docket G-2210 was thereupon consolidated for hearing with Dockets G-1142, G-1508, G-2019 and G-2074, then pending and in course of hearing. Respondent ordered hearing upon such application to begin July 20, 1953 which was done; Petitioner sought leave to intervene which was granted, thereby authorizing and empowering Petitioner to present in the

record of said proceeding any evidence, if any, which it might have touching upon the right of United in Docket G-2210 to have said proposed increased rates finally established, and thus, was fully authorized and empowered to [fol. 183] present to Respondent any evidence, if any, which it might have bearing upon the issue whether such rates were just and reasonable and whether they should be finally authorized by Respondent. Said proceeding including Docket G-2210, which was thereafter recessed at order of Respondent, has now been by Respondent's order set for cross-examination and *hearing to be resumed* at the hearing rooms of Respondent in Washington, D. C. on *23 March 1954*. At expiration of the suspension, suspended rates became effective through the procedure provided by Section 4(e) of the basic Act with the customary statutory provision to protect refunds, if any are ordered by the final order in the proceeding.

5. Instead of availing itself of its right and permission to intervene and display and adduce before Respondent whatever grounds, rights or evidence, if any, it might have touching its several contentions respecting the rates involved, Petitioner sought deviation by filing an independent proceeding under the Docket No. of G-2227, and the making of a collateral attack upon the order of July 10, 1953, issued in Docket G-2210 in which it sought and was granted right to intervene. Pursuant to leave, United intervened in Docket G-2227 in opposition to Petitioner's application.

6. United therefore has a direct interest in the matters involved in this Petition for review, because it will be directly affected by the decision and rulings of the Court herein, and because the issues sought to be presented to this Court and upon which the decision of this Court will turn involve the rights, duties, and obligations of United under the Natural Gas Act both to Petitioner and to Respondent.

[fol. 184] Grounds Upon Which Intervention is Sought

1. Petitioner, before Respondent and by this Petition, contends:

(a) That a contract for a fixed term is superior to, and beyond the reach of, the regulatory authority of Respondent

which is claimed to be without power of regulation to change such *rate* unless first finding the *contract* contrary to the public interest under Section 5(a) of the Act, and that it is superior to, and beyond the reach of, Section 4(e) of the Natural Gas Act;

(b) That such contract presents a rate not subject to regulatory interference except after a proceeding under Section 5(a);

(c) That such contract prevents Respondent and United from performing and exercising their respective duties, rights, and obligations granted and imposed by the Natural Gas Act with respect to Section 4 of that Act; and

(d) That such contract requires Respondent, (contrary to the provisions of the Natural Gas Act), to reject without hearing an application lawfully filed under Section 4(e) of the Act.

2. Such contentions are without force and effect and are wholly without merit upon the following grounds:

[fol. 185] (a) No private contract may be validly made or enforced which purports, or is contended, to deprive, restrict, impair, or destroy any right or duty of a natural gas company or Respondent as required by the Natural Gas Act, and any and all contractual provisions at variance with any such right or duty are wholly unenforceable.

(b) United as a natural gas company subject to Respondent's regulatory jurisdiction may charge only just and reasonable rates which it has the duty under the Act, including Section 4(e) to propose for Respondent's approval or acceptance; and Respondent itself, or, on complaint of any of those persons specified in Section 5(a) of the Act, has the power to investigate and determine the reasonableness of rates: And such powers, rights, and duties of natural gas companies, their contractees, and Respondent, cannot be changed, altered, restricted, or destroyed by any contract or contractual provision between the natural gas company and any of its customers so that United and Petitioner, as a matter of law, were not and are not free validly to contract in derogation of any of the terms and provisions of the Natural Gas Act, or the exercise of rights and duties conferred or required by that Act either upon United or Respondent.

[fol. 186] (c) The original contract and all amendments and supplements thereto, the conversion tariff which superseded and replaced the contract and all the supplements thereto, and the application filed by United and docketed in Docket G-2210 are in all things subject to the Respondent's powers and duties under the Act, and may not be used to circumscribe, prevent, restrict, avoid, stalemate, or delay the free exercise and performance of the respective rights, duties, obligations, and powers granted and imposed by the Natural Gas Act upon United as a natural gas company, and Respondent as the administrator of the Act, and any such claimed to be so effective are inoperative, unenforceable, and invalid.

(d) Rate making and regulation by Respondent is a legislative function under the Act in no wise subject to private contractual obligation, and the respective rights, duties, and powers of United and Respondent under the Act, including Sections 4 and 5, are in every respect superior to contractual provisions.

(e) All contractual provisions and rates approved or merely accepted for filing by Respondent are subject always to the rights and duties of United, as a natural gas company and to Respondent under the Act, including Sections 4 and 5, to propose and fix just and reasonable rates.

[fol. 187] (f) Petitioner's contentions would have effect to annul and cancel applicability of Sections 4(d) and (e) of the Act to United, which would be against public policy, for one subject to regulation may not impair, interfere with or deviate regulation by contractual provisions having an effect to rescind and annul the application of a statute, or any part thereof.

(g) A filed rate, whether fixed or merely accepted for filing by Respondent, is the only lawful rate, and thus the rate filed in Docket G-2210 and permitted by the Commission to become effective pending hearing is the only lawful rate between United and Petitioner binding equally on both.

(h) The order of July 10, 1953, is a final, valid and binding order on Petitioner, sets up the only lawful rate which United may charge the Petitioner pending the hearing in Docket G-2210, is therefore conclusive upon Petitioner, and cannot be collaterally attacked by Petitioner in the inde-

pendent proceeding from which this appeal purports to be taken.

(i) The relief sought by Petitioner from Respondent and by this appeal if granted would require Respondent to act contrary to the ambit of authority granted by the Act. [fol. 188] (j) The petition to Respondent in Docket G-2227 and this petition for review show that requirements of due process have been fully complied with in that Petitioner had due notice pursuant to Respondent's Rules and Regulations of the pendency and identity of the subject matter of Docket G-2210, was permitted to intervene, and thus continues to have ample opportunity either to offer such evidence, if any, which it may have bearing upon the ultimate issue to be there decided, whether the rates proposed by United are just and reasonable.

3. United's Counsel is advised by Samuel M. Johnston, Esquire, of Johnston, McCall & Johnston, Attorneys of Record for Petitioner, and by Louis L. DaPra, Esquire, Attorney for Respondent, that there is no objection to this intervention by United.

Prayer

Wherefore, premises considered, United moves and prays:

1. That it be authorized and permitted by this Court to intervene in this cause in opposition to Petitioner and in support of the validity and correctness of the action and orders of Respondent.

2. That in accordance with Rule 18(6) it be permitted to participate in the designation of the record.

[fol. 189] 3. That it be permitted to file an answer to the Petition for Review within such time and upon such terms as this Court may designate.

4. That pursuant to the Rules of this Court it be permitted to participate in the briefing, oral argument, and submission of this matter.

5. For such other orders or directions as this Court may deem proper in the premises.

Respectfully submitted, United Gas Pipe Line Company, by Thomas Fletcher, Its Attorney.

Wilbert O. Crain, General Counsel; George D. Fiser, United Gas Building, 1525 Fairfield Avenue, Shreveport, Louisiana; Thomas Fletcher, Niels Esperson Building, Houston 2, Texas; C. Huffman Lewis, 1525 Slattery Building, Shreveport, Louisiana, Counsel for Intervener.

[fol. 190] *Duly sworn to by Thomas Fletcher March 15, 1954. Jurat omitted in printing.*

[fol. 191] Certificate of Service [Omitted in printing]

[fol. 192] In United States Court of Appeals for the Third Circuit

[Title omitted]

No. 11,280

Order Permitting Petitioner to Intervene—Filed March 17, 1954

Upon consideration of the motion by United Gas Pipe Line Company, and there being no opposition to the motion;

It is ordered that United Gas Pipe Line Company be, and it is hereby granted leave to intervene as a party respondent in the above-entitled case, to participate in the designation of the record, to file a brief, and to participate in the oral argument.

By the Court, Maris, Circuit Judge.

March 17, 1954

(File endorsement omitted)

[fol. 192a] [File endorsement omitted]

[fol. 193] In The United States Court of Appeals for the Third Circuit

[Title omitted]

No. 11,280

Motion of United Gas Pipe Line Company, Intervener, for Certification of Additional Material, Etc.—Filed April 15, 1954

[fol. 194] To the Honorable Judges of Said Court:

Intervener, United Gas Pipe Line Company (Herein called "United") moves the Court under Rule 18(7) for an order:

(a) Directing Respondent Federal Power Commission (herein called "Commission") to prepare a supplemental transcript of record to contain the matters listed in Exhibit "A" attached hereto and hereof made a part of this motion, certify to the same, and forward under such conditions and within such time as this Court may set; or

(b) For an order authorizing United to secure certified copies from the Commission of each and all of the matters set out in Exhibit "A" attached hereto and hereof made a part and then to file the same as a supplemental transcript of the record in this cause within such time and upon such terms as this Court may order; and

(c) For an order enlarging the time within which United may prepare and file its brief herein dependent upon the forwarding of the supplemental transcript of the record herein prayed for,

and in support thereof shows the following grounds:

By order of July 10, 1953, in Docket G-2210, the Commission accepted United's application for increased rates, and, pursuant to Section 4(e) of the Natural Gas Act, ordered increased city gate rates suspended, permitted increased rates for sale of gas to Mobile Gas Service Corporation, Petitioner, (herein called "Mobile") for resale for industrial use only to become effective pending the hear-

ing, and ordered Docket G-2210 consolidated for hearing [fol. 195] with Dockets G-1142, G-1508, G-2019 and G-2074. On August 4, 1953 Mobile instituted Docket G-2227, attacking the order of July 10, 1953, in Docket G-2210, and seeking in part certain cancellations, changes and modifications in said order as to gas for resale for industrial use.

The ultimate position of Mobile may be stated thus: Since Mobile asserts a contract with United for firm rates for gas for resale for industrial purposes only to Ideal Cement Company, United is without any power or right under the Natural Gas Act to comply with or perform the duties cast upon it by that Act with respect to rates, or their increase, and the Commission is without power under the Act to change or affect or regulate the rates set out in the claimed contract unless and until the Commission in a proceeding under Section 5(a) *first* finds that the *contract*, as distinguished from any rate obligation contained in the contract, is against public interest, and, so, orders it abrogated.

The record certified by the Commission does not contain the attacked order of July 10, 1953, or the relevant record reflecting either the context of filings and orders giving rise to the order of July 10, 1953, or the contractual papers constituting the foundation of Mobile's asserted right.

Demonstrating necessity and materiality of presence of Items in Exhibit "A" to a proper decision hereof, United says:

[fol. 196]

1.

The order of July 10, 1953, in Docket G-2210, attacked by the initiation of this cause, is not certified. Clearly consideration of that order and the context out of which it came is essential to full and balanced determination of whether that order is subject to the collateral attack made upon it. (Item 1, Exhibit "A").

2.

Federal Power Commission Rate Schedule No. 20, the basic contract. (Item 2, Exhibit "A").

This is the base contract claimed by Mobile. While executed prior to enactment of the Natural Gas Act, it is expressly made subject to all lawful and valid rules and regulations and orders of any state or federal agency having

jurisdiction. It thus contractually provided the caveat which the law would import in any event even before the exercise by the Congress of the delegated Federal power over interstate commerce. That contract is mentioned at Page 4 of Mobile's Petition in Docket G-2227; P. 2, Petition to Review.

Items 4, 6, 8, and 9 are supplements to said agreement, Item 6 being the particular consent letter so heavily relied on by Mobile. These contracts must be in the record for this Court to evaluate, weigh and measure what the contractural obligation actually was and its weight in the scales against the exclusive primacy of the regulation and administration under the Natural Gas Act delegated to the Commission.

[fol. 197] Items 3, 5, 7, 8-a, and all are orders by the Commission permitting such contracts and supplements to be filed and become effective. United's representative on April 13, 1954, was refused access to the records of the Commission to check these orders and was told to file a written application to the Commission for Commission consideration and possible order, which was admittedly not possible in United's effort to obtain submission of this motion by April 19, 1954; but upon information and belief United alleges that each of said orders will have this or similar language:

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate, charge, classification, or any rules, regulation or practice affecting such rate or service contained in your tariff; *nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith.*" (Emphasis supplied)

Relevancy on the claim of contractual superiority to statutory regulation and propriety of the Commission's order of July 10, 1953, and of December 7, 1953, upon which this appeal purports to be based, is manifestly materially affected by the determination and consideration of the effect

and result of such language and judicial position of the Commission.

The provisions in these orders are now carried forward by the Rules and Regulations of the Commission 18 C. F. R. 154.23 quoted by the Commission in the order of December 7, 1953, appealed from.

[fol. 198] 3.

United, under compulsion of Commission Rules and Regulations, filed a conversion tariff which converted to tariff form all contracts filed as rate schedules, including the contract and all 46 supplements and amendments with Mobile. This included the applicable tariff sheets 43 and 44 (Item 13) and a required statement pursuant to Section 154.85 (Item 12) listing the parts of the basic contract and all supplements and amendments thereto which could be retained in accordance with such Rules and Regulations as an executed service agreement. This filing was docketed by Commission as No. G-2019. It was combined with an application for increase of certain pipe-line rates and certain notices of cancellation affecting jurisdiction, (the latter two portions not pertinent here). The Commission's order of approval (Item 14) is conclusive. Mobile refers to this tariff in Paragraph 8, Page 7, Petition in Docket G-2227, and P. 3 of Petition to Review.

On the issue of claimed superiority of asserted contract right to any regulatory orders or authority of the Commission or United's rights and duties under the Natural Gas Act; when in this record, these matters, which had to be in contemplation of the Commission in its consideration of the proceeding at Docket G-2227, will demonstrate that the contract, which Mobile claims in its Petition to Review and in Docket G-2227 was inviolate, had, as a matter of law, [fol. 199] already been superseded and replaced by the conversion tariff, obligatory under Commission Rules and distinctly different in content and effect from the contract claimed. Thus, the posed question of "abrogation" was moot even before United filed, at G-2210, the application for increase in industrial rates permitted to become effective pending hearing by the order of July 10, 1953, at which Mobile's proceeding in G-2227 was aimed.

To determine whether consent of the parties could be obtained to this motion, the writer telephoned the Hon. William C. Chanler, Counsel for Mobile, and advised that Items 12, 13, and 14 would be included and the position of United thereon, and was then advised by Mr. Chanler that opposition would be urged on the ground that United was reputed to have advised Mobile that the conversion tariff did not affect it and could be ignored, or words of similar purport. The writer has found no evidence of such a representation in diligent efforts made since the call on the morning of Tuesday, April 13, 1954, but has found and attaches hereto as Exhibit "B" a letter from United to Mobile of May 29, 1952, forwarding the filing of the conversion tariff, including the statement made pursuant to Section 154.85, which on its face showed that only portions of said contract were being retained as required by the Rules and Regulations of the Commission. United suggests that the filing of [fol. 200] a conversion tariff required by the Rules and Regulations of the Commission which rendered abandonment of a contract as such compulsory and the conversion to tariff form obligatory, and which permitted, as required by the Rules, only certain portions of the contract to be retained as a service agreement: had a result in law beyond the power of United to affect, obviate, avoid, weaken, or prevent. Such legal result flowing from compliance with Commission Rules and Regulations is inescapable, for if compliance with the Rules and Regulations of the Commission and the filing of the statement (Item 12, Exhibit "A"), copy of which marked Exhibit "D" is attached, at law superseded said contract; any representation by United of a contrary legal result would not over-come the legal actual notice visited by Exhibits "B" and "D", nor could it restore a contractural situation changed, outmoded and prohibited by the Rules and Regulations and order of the Commission. United thus submits that the filing of the conversion tariff, and the order of the Commission permitting the filing, are necessary and vital parts of the record, essential to a proper and correct determination of the validity of the order of July 10, 1953, and the Commission's repudiation of Mobile's attack upon that order by the proceeding in Docket G-2227.

In the order permitting the conversion tariff to become

effective (Item 14, Exhibit "A") issued in Docket G-2019, paragraph (D) contained substantially the same caveat recorded on Page 4. Thus, the Commission carried forward [fol. 291] its refusal to approve a contractural provision in accordance with Mobile's interpretation or contention as being sacrosanct and superior to regulatory control under the Natural Gas Act.

4.

As pointed out, the order of July 10, 1953, issued in Docket G-2210 and also in the other Docket Nos. G-1142, G-1508, G-2019, and G-2074, with which G-2210 was then consolidated, suspended certain rates not pertinent here, and with respect to the industrial rates of which Mobile complains, ordered in Paragraph "B":

> "Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40, and Second Revised Sheets Nos. 31 and 39, be and the same hereby are permitted to become effective on July 25, 1953."

Second Revised Sheet No. 39 and First Revised Sheet No. 40 applicable to Mobile (Item 15(a)(b), Exhibit "A" attached) are referred to and alleged in paragraph 9 of Mobile's petition in G-2227. It was for this portion of the order of July 10, 1953, that Mobile sought substitutions, modifications, and changes, and made attack upon the order of July 10, 1953. Thus such revised sheets, together with the letter notice from the Commission to Mobile (Item 16, Exhibit "A") of the filing of the application in Docket G-2210, the order of the Commission (Item 17, Exhibit "A"), the petition of Mobile for leave to intervene in the [fol. 292] consolidated docket, and the Commission's orders thereabout (Items 18 and 19, Exhibit "A" attached hereto) alleged in paragraph 11 of Mobile's Petition are essential and necessary so that this Court can have the context of the order attacked and thus be in a position with relevant and material record before it to weigh the respective contentions of the parties hereto to Mobile's Petition to Review affecting its effort to have the Commission recall, modify and substitute orders for the order of July 10, 1953.

In Mobile's Petition to Review, it is alleged that the order in Docket G-2227 deprived Mobile of its contract rights

without a hearing (P. 7, Petition), deprived it of its property rights without due process of law (P. 8, Ground One, Petition), deprived it of an opportunity to test the lawfulness and reasonableness of its existing contract, compelling it to pay an increase rate in excess of the contract rate without opportunity of hearing (Ground Two, P. 8-9, Petition); and that the Commission's refusal in the teeth of Section 4(e) of the Natural Gas Act to require that United refund Mobile any portion of the industrial rate increase found not to be just and reasonable was a deprivation of property and rights without due process (Ground Three, P. 9, Petition), and the repetition in Ground Four (P. 9, Petition) of no opportunity to be heard, all are shown to be without foundation, because the granted right to intervene and participate in G-2210 and the other consolidated dockets [fol. 203] thereabout (Items 15, 16, 17 and 19) show:

(a) That Mobile was permitted to intervene with the right to adduce any evidence in its possession as to why the proposed rates were unjust and unreasonable, which necessarily would include the right to offer any evidence, if any it had, as to why the so-called "contract rates" were the maximum, just and reasonable rates; but because they were just and reasonable and not because they were contained within a contract;

(b) Would show that it had full opportunity to be heard both in contest and in affirmative offerings;

(c) Would give it freedom to contend, if it was so advised, that its contract continued to give it rights even though superseded by the filing and operation of the conversion tariff as required by the Rules and Regulations of the Commission;

(d) That Mobile so recognized by its application to intervene, and also by the fact that it sought at first to file its application in the consolidated cause before it separately filed it under the heading of Docket G-2227;

(e) That such items taken with Item 11 being a general rate investigation initiated in 1948 by the Commission covering all of United's rates, gave to Mobile as a participant in the consolidated proceeding all

rights to participate and be heard which it could possibly expect

Is this Court to be asked to declare a denial of right when the records, if properly before this Court, refute denial?

From the foregoing it is obvious that Mobile sought and was given full opportunity to be heard, which opportunity continues to exist in the consolidated proceedings now in [fol. 204] course of hearing, in which it is free to present such evidence, if any it may have, touching the issue as to whether the rates proposed and sought by United in Docket G-2210 are just and reasonable, as well as to offer evidence upon what rates, if any, Mobile contends and believes are just.

The position of the Commission is understood to be that the certified matters were the only matters before it in issuing the order denying Mobile's petition, but it is submitted that a mere examination of the scope and range of the matters listed, relied upon, and taken into consideration in the assertion and decision of the issues as shown by Mobile's Petition, its supporting memo, United's Petition in Intervention and Answer, Mobile's Reply, and the Commission's order of December 7, 1953, (P. 1, 24, 50, 65, 75, Certified Record) and the order of July 10, 1953, attacked in Mobile's Petition but not certified, copy of which marked Exhibit "C" is attached hereto; show specific reliance, basis of contention, and basis of decision to have included each and all of the items listed in Exhibit "A" attached to this motion, with all of which the Commission has judicial knowledge and familiarity, and obviously the purport and effect of all of such items, considered in the light of, and in their proper place under, the Natural Gas Act and the Commission's administration thereof, were an integral, structural part of the foundation from which the Commission proceeded to the order of December 7, 1953.

[fol. 205] It is thus respectfully submitted that the items listed in Exhibit "A" attached hereto are thus shown and are clearly demonstrated to have such relevance and materiality as that their absence from this record deprives this Court of the necessary material upon which mature and just consideration can be given to the issues and contentions raised in this proceeding, and in the absence of which

such issues cannot be with balance, justness, forthrightness and completeness determined.

5.

United is authorized by the Hon. William C. Chanler, Counsel for Mobile, to say that the five days' notice under Rule 30(1) will be waived; and further is authorized to say that he will notify the writer by long distance phone by Friday, April 16, 1954, whether Mobile will consent for this motion to be submitted upon the motion and answer without necessity of oral argument, at which time the writer will notify the Clerk of this Court by long distance phone. If Mobile desires oral argument, it is agreed that the motion be upon the motion calendar of this Court for Monday, April 19, 1954.

6.

The writer is authorized by the Hon. Louis DaPra, Counsel for the Commission, to say that if a copy of this motion be received by the Commission on or by Thursday, [fol. 206] April 15, 1954, the five days' notice under Rule 30(1) will be waived. If the Commission waives such notice, then this motion may be submitted on Monday, April 19, 1954; but if the Commission does not waive such notice, the writer understands that the next motion day is on Monday, May 3, 1954, and the notice of this service will thereupon be for such date.

The writer is further authorized by Mr. DaPra to say that Mr. DaPra will likewise on Friday, April 16, 1954, advise the writer by Long distance phone whether the Commission will agree that this motion may be submitted on April 19, 1954, upon the motion and answer without the necessity of oral argument, or whether oral argument will be demanded by the Commission. As soon as the writer is advised by Mr. DaPra he will promptly call the Clerk of this Court by long distance phone.

7.

By virtue of all of the foregoing United requests that if the foregoing motion be granted by the Court that the time thereupon be enlarged within which United, as in

tervening Respondent, may prepare and file its brief. A brief properly setting forth the contentions of United for the consideration of the Court in decision of the petition to review would, as shown by the foregoing, be addressed [fol. 207] to the items in Exhibit "A", as well as those items already certified by the Commission, and thus United would desire some extension of time which the Court deems just from and after the date of the filing of the supplemental transcript within which to prepare and file brief. This extension is rendered necessary by telephonic advice to the writer by the Hon. William C. Chanler that his brief would be filed in this Court in this cause on either April 14 or 15, 1954.

WHEREFORE, premises considered, United prays the judgment of this Honorable Court of the foregoing motion for the preparation and certification of a supplemental transcript thereto, for an extension of time within which [fol. 208] to prepare and file brief of United in this matter, and for such other orders as to the Court may seem best and proper.

Thomas Fletcher, 11th Floor, Esperson Building, Houston 2, Texas. C. Huffman Lewis, 1525 Slattery Building, Shreveport, Louisiana, Counsel for Intervener United Gas Pipe Line Company.

Wilbert O. Crain, General Counsel; George D. Fiser, Vinson, Elkins, Weems & Searls, Niels Esperson Building, Houston, Texas, Wilkinson, Lewis & Wilkinson, Slattery Building, Shreveport, Louisiana; Of Counsel.

[fol. 209] Certificate of Service by Thomas Fletcher, dated April 14, 1954 (omitted in printing).

[fol. 210] EXHIBIT "A" TO MOTION

List of Items Sought to be Certified and Included in Supplemental Transcript of Record.

1. Federal Power Commission Order adopted July 10, 1953, issued July 10, 1953, in Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, titled "Order Suspending Proposed Rate Schedules, Permitting Proposed Rate Schedules to become Effective on Thirty Days' Notice pending Hearing, Consolidating Proceedings and Fixing Date of Hearing".

2. Federal Power Commission Rate Schedule No. 20, Filed August 22, 1938, effective January 1, 1936, being contract between United Gas Public Service Company (predecessor of United Gas Pipe Line Company) and Mobile Gas Service Corporation, dated January 1, 1936.

3. Federal Power Commission Order dated —permitting F. P. C. Rate Schedule No. 20 to be filed and become effective.

(Refusal of access to Commission's files prevents any accurate description of the order.)

4. Supplement No. 7 to F. P. C. Rate Schedule No. 20 filed November 10, 1941, effective July 1, 1941, being a supplemental amendatory agreement dated October 17, 1941, between United Gas Pipe Line Company and Mobile Gas Service Corporation.

5. Federal Power Commission Order dated December 4, 1941, permitting supplement No. 7 to be filed and become effective.

6. Supplement No. 10 to Supplement No. 7 to F.P.C. Rate Schedule No. 20, filed August 14, 1946, effective July 26, 1946, being a letter amendatory agreement dated June 28, 1946, from Mobile Gas Service Corporation to United Gas Pipe Line Company consented to by the latter.

7. Federal Power Commission Order dated September 17, 1946, permitting Supplement No. 10 to Supplement No. 7 to be filed and become effective.

[fol. 211] 8. Supplement No. 9 to F. P. C. Rate Schedule No. 20, filed September 30, 1946, effective January 1, 1947, being a supplementary amendatory agreement dated July 30, 1946, between United Gas Pipe Line Company and Mobile Gas Service Corporation.

8-a. Federal Power Commission letter dated November 4, 1946, permitting Supplement No. 9 to be filed and become effective.

9. Supplement No. 11 to F. P. C. Rate Schedule No. 20, filed July 20, 1948, effective May 12, 1948, being a letter from United Gas Pipe Line Company to Federal Power Commission.

10. Federal Power Commission Order dated August 12, 1948, permitting Supplement No. 11 to be filed and become effective.

11. Order of October 12, 1948, wherein the Federal Power Company initiated on its own motion under Section 5(a) of the Natural Gas Act an investigation to determine whether any of United Gas Pipe Line Company's rates were unjust, unreasonable, unduly discriminatory, or preferential, docketed as G-1142.

12. From the filing of the conversion tariff, filed as required by the Rules and Regulations of the Commission:

Statement pursuant to Rule 154.85 applicable to F. P. C. Rate Schedule No. 20, listing those parts and portions of F. P. C. Rate Schedule No. 20 and the 46 supplements and amendatory agreement thereto to be retained as a service agreement as permitted by such Rules.

13. From original Volume No. 1 of the conversion tariff files as referred to in Item No. 12, Sheets 43 and 44, being Rate Schedule Ind. 3-J being the sheets in said conversion tariff applicable to Mobile Gas Service Corporation. [fols. 212-218] 14. Federal Power Commission Order allowing the conversion tariff to become effective in part (including that part applicable to Mobile Gas Service Corporation), suspending the conversion tariff in part, and suspending notice of cancellation and suspending certain application for increase in rate and not pertinent here, and dated July 31, 1952, issued August 1, 1952, in Docket G-2019.

15. On the filing for increased rates by United Gas Pipe Line Company at Docket G-2210:

(a) First Revised Sheet No. 40;
(b) Second Revised Sheet No. 31,
both filed June 24, 1953, and being applicable to the sale

to Mobile Gas Service Corporation for resale for industrial purposes (to Ideal Cement Company.)

16. Federal Power Commission letter notice to Mobile Gas Service Corporation dated June 26, 1953, advising and notifying of the filing in Docket G-2210.

17. Federal Power Commission Order in Docket G-2210 dated July 10, 1953, suspending certain proposed rate schedules, permitting certain proposed rate schedules to become effective on thirty days' notice pending hearing, ordering consolidation with Dockets G-1142, G-1508, G-2019, and G-2074.

18. Petition of Mobile Gas Service Corporation for leave to intervene in Docket G-2210, consolidated with Dockets G-1142, G-1508, G-2019, and G-2074, filed July 17, 1953.

19. Federal Power Commission Order adopted August 12, 1953, issued August 14, 1953, permitting and authorizing Mobile Gas Service Corporation to intervene and participate in the consolidated hearing in Dockets G-1142, G-1508, G-2019, G-2074 and G-2210.

20. In connection with the filing of the conversion tariff in Docket G-2019:

(a) Federal Power Commission Letter to Mobile Gas Service Corporation dated June 3, 1952, advising of the filing of the conversion tariff made on May 29, 1952.

(b) Federal Power Commission Letter Notice dated July 8, 1952, notifying of the re-filing of the conversion tariff on July 3, 1952.

[fol. 218a] [File endorsement omitted.]

[fol. 219] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITIONER'S MEMORANDUM IN OPPOSITION TO INTERVENOR'S MOTION FOR ADDITIONAL CERTIFICATION TO THE TRANSCRIPT OF RECORD AND ENLARGEMENT OF TIME TO FILE BRIEF—Filed April 19, 1954

This memorandum is submitted by petitioner, Mobile Gas Service Corporation (Mobile) in opposition to the motion of intervenor, United Gas Pipe Line Company (United), for certification of additional material in a supplemental transcript of record and, if such certification be ordered, for enlargement of intervenor's time to prepare and file its brief. It is petitioner's contention that the motion should be denied because all matters proper or necessary for a determination of the question under review are con- [fol. 220] tained in the transcript of record heretofore certified to this Court by the Federal Power Commission (the Commission), and because certain of the matters sought to be added raise issues which were not before the Commission in the proceeding in which the order under review was issued.

Statement

This is a proceeding to review an order of the respondent, Federal Power Commission, issued on December 7, 1953, which denied certain requests for final relief contained in a petition filed with the Commission by petitioner, Mobile Gas Service Corporation, on August 4, 1953, dismissed Mobile's petition, and terminated the proceeding. In its petition, Mobile had requested, together with certain other incidental relief, that the Commission reject the filing of a schedule of rates for the sale of gas by intervenor, United, on the ground that said schedule was illegally filed in violation of a valid and subsisting contract between Mobile and United.

The petition to review was filed on March 9, 1954. On April 7, 1954, the Commission certified to this Court the transcript on which the Commission's order had been entered. On April 14, 1954, Mobile filed its brief herein, to-

gether with an appendix containing the relevant portions of said transcript as filed with the Court by the Commission. [fol. 221] For the convenience of the Court, a copy of said appendix is submitted herewith. References herein are to the pages of said appendix.

On April 15, 1954, United filed the present motion, asking this Court to direct the Commission to certify certain additional material to be forwarded in a supplemental transcript of record, and, if its motion for the certification of additional material be granted, for an enlargement of its time to file an answering brief. It is petitioner's basic contention that the motion must be denied because all of the facts necessary for a determination of the issues decided in the order under review and presented for review herein are contained in the pleadings, which, together with certain incidental documents, have already been certified to the Court by the Commission. It is also our contention that an examination of the additional material sought to be added to the transcript will show that none of it is necessary for a determination of the issues presented and that, with one exception, none of it is legally admissible.

For convenient presentation, the additional material sought to be added to the transcript of record may be divided into three categories: (a) certain contracts which, while technically admissible because they were incorporated by reference in the petition which initiated the proceeding [fol. 222] under review, are nevertheless unnecessary because they were adequately described in the pleadings for the purposes of raising the issues determined by the Commission's order; * (b) certain documents which were not included in the record before the Commission, either directly or by reference and incorporation, and are, therefore, legally inadmissible, and are also unnecessary because all relevant portions of such documents were adequately described in the pleadings for the purposes of raising the issues determined by the Commission's order; (c) certain documents which were not before the Commission in the proceeding in which the order arose and which are not only legally inadmissible, but legally improper, because, according to

* These contracts have now been certified by the Commission, with our approval, so this point is moot.

United's motion papers. United now proposes to raise on this review on the basis of such documents certain issues of fact and law which were not raised before the Commission or passed upon by it in the order under review.

[fol. 223]

I

The Transcript of Record Certified to This Court by the Respondent Commission Contains All of the Documents Considered by the Commission in the Proceeding in Which the Order under Review Was Entered and Necessary for a Determination of the Issues Involved in This Review

The proceeding in which the order under review was issued was initiated on August 4, 1953, by the filing of a petition by Mobile (A. 19a) alleging, in substance, as follows: that it had entered into a valid and subsisting contract with United to purchase gas for resale to the Ideal Cement Company ("Ideal"), at the rate set forth therein, for a term of years; that in violation of said contract, United, on June 24, 1953, had filed a schedule of proposed rate increases with the Federal Power Commission under Section 4 of the Natural Gas Act; that such filing was illegal; and that by an order entered on July 10, 1953, the Commission had erroneously permitted such filed rates to go into effect. On the basis of these allegations, Mobile requested that the Commission reject the filing, or, in the alternative, hold a separate hearing as to the lawfulness of the filing, and grant Mobile certain other relief.

This petition was originally filed in consolidated proceedings then and now pending before the Federal Power Commission and relating to United's rates. But because Mobile was not at that time a party to these consolidated [fol. 224] proceedings, it requested leave to amend its petition so as to have it filed in a separate proceeding. This relief was granted by the Commission (A. 4a, 26a).

On September 14, 1953, United filed its petition to intervene and answer to Mobile's petition, in which, after reciting generally facts similar to those recited by Mobile, United set forth nine reasons why it claimed that it had a legal right to abrogate its contract with Mobile by merely filing a schedule of higher rates before the Commission under Section 4 of the Natural Gas Act (A. 32a, 36a-40).

On September 29, 1953, Mobile filed its reply to United's answer (A. 43a). On December 7, 1953, the Commission, without hearing, issued the order herein under review, denying all the relief sought by Mobile, asserting that the schedule of filed rates was properly filed under Section 4 of the Natural Gas Act, dismissing the petition and terminating the proceeding (A. 3a). It is apparent upon the face of the Commission's order that it was based on the allegations of Mobile's petition and that it determined only the legal arguments presented respectively by Mobile's petition and United's answer.

After denial by the Commission of Mobile's motion for rehearing on February 4, 1954 (A. 63a), the present petition for review was filed in this Court (A. 65a).

The Commission has certified as the transcript of record herein all of the documents docketed in the separate proceed-
[fol. 225] ing established by the Commission, as above stated, and in which the said order under review was issued.

The order under review recites the relevant facts appearing in the pleadings, and its decision is based exclusively on those facts (A. 3a). From a procedural aspect, therefore, the order under review was in the nature of a decision on a motion for judgment on the pleadings. It is axiomatic that on review of such an order, the appellate court can only consider the pleadings on which the order was entered.

The basic issue raised by those pleadings was purely a question of law: whether or not a valid and subsisting contract to furnish natural gas at a fixed rate for a term of years was valid and binding under the Natural Gas Act until set aside by the Commission on a finding that it was against the public interest under the provisions of Section 5(a) of the Act, or whether such a contract may be unilaterally abrogated by United by a mere filing of a schedule of higher rates under Section 4 of the Act. This was the only issue raised by the documents before the Commission or determined by the order under review, except for certain incidental procedural matters arising from the determination of the basic issue. As appears from the statement of "Questions Involved" in petitioner's brief filed herein on April 14, that is also the only issue presented on this review (except for the incidental procedural matters not here ma-

[fol. 226] terial). Those questions are there stated as follows:

> "1. Does the Natural Gas Act automatically render all contracts for the sale of natural gas at an agreed rate for a fixed term unenforceable and void, or does it delegate the power to abrogate such contracts to the Federal Power Commission?
>
> "2. If the Natural Gas Act does not automatically render all such contracts void and unenforceable, may the power to abrogate such contracts be exercised by a natural gas company by the mere filing of a schedule of increased rates under Section 4, or can it be exercised only by the Commission after a hearing and finding under Section 5(a) that the contract is unreasonable?
>
> "3. Do the provisions of Section 4(e) prevent the Federal Power Commission from making provisions for refund in the event a proposed schedule of higher rates which has not been suspended is ultimately held unreasonable or unlawful?" (Petitioner's Brief, p. 1)

We submit that it is clear from an examination of the petition, answer, reply, and from the Commission's order itself (A. 3f) that all of the facts necessary for a determination of these questions are contained in the documents upon which the Commission acted and which have been certified by the Commission to this Court.* We submit that they are the only documents which may be considered by this Court on this review.

[fol. 227]

II

None of the Documents Sought to be Added to the Transcript of Record Are Necessary to a Determination of the Issues Presented, and Most of Them are Legally Inadmissible.

While intervenor's motion papers divides the documents which it seeks to have added to the transcript of record

* Mobile's petition is at page 19a of the Appendix, United's answer at page 32a; Mobile's reply at page 43a and the Commission's order at page 3a.

into four separately numbered point headings, we propose to consider them here in the three separate categories hereinabove outlined: (a) those technically admissible but unnecessary; (b) those not before the Commission, and unnecessary to a determination of the question presented; and (c) those which were not before the Commission and which raise issues not presented or passed upon by the Commission in the order under review.

(A) *Documents technically admissible but unnecessary.*

The pertinent provisions of the four contracts referred to under subheading "2" of the motion papers herein, and listed as items 2, 4, 6 and 8 in Exhibit A thereto, being the contracts between Mobile and United which Mobile now contends were improperly abrogated by the filing of the schedule of proposed higher rates, are adequately described in the pleadings and are likewise adequately described in the Commission's order, for the purpose of raising the issues here involved. There appears to be no necessity, therefore, to print them in full as a [fol. 228] part of the record. However, as these contracts were expressly incorporated by reference in Mobile's original petition initiating the proceedings before the Commission, they would appear to be technically a proper part of the record and Mobile has no objection to their certification if the Court so desires.*

(B) *Documents which are both inadmissible and unnecessary.*

These documents are referred to under various headings in the motion papers and therefore we will deal with them separately in an attempt to meet the points made as to each group.

(1) In Point 1 of the motion papers, United asks that the Commission's order of July 10, 1950, be certified on the ground that this was the order which permitted the

* We have now been informed that the Commission intends to certify these contracts, and have no objection thereto.

proposed rate increases complained of by Mobile to become effective as of July 25, 1953. This order was not made a part of the record in the present proceedings by either party. The relevant portions thereof were either quoted or described in the petition (A. 15a-16, 18a-21). We submit that it is apparent from the Commission's order that [fol. 229] such quotations and description are sufficient to support a decision on the questions at issue. We think, therefore, that it would be improper to permit the order to be added to the record, lest other issues not raised before the Commission and not heretofore advanced by any party might be predicated thereon for the first time in the proceedings before this Court.

(2) In Point 2 of the motion papers, in addition to the four contracts hereinbefore referred to, United asks that the orders of the Commission permitting the contracts to become effective should be added to the record (Ex. A, items 3, 5, 7 and 8-a). These orders were not made a part of the record before the Commission. However, Mobile's petition recites that the contracts had been duly filed with the Commission (A. 13a-14) and United's answer recites that they were "by this Commission permitted to become effective" (A. 33a). These recitals of the effect of the orders were accepted by the Commission (A. 5a), and we believe that it would not only be unnecessary but improper to permit such orders to be added to the record at this time, lest additional issues not presented to the Commission should be based thereon. If United intended to base any additional arguments on any particular provisions of these orders not presented by the pleadings, it had an opportunity to raise them before the [fol. 230] Commission in its answer to Mobile's petition. It cannot raise any such issues as an afterthought on this review.*

* We should like to point out in passing that in any event the so-called reservations in the Commission's orders as to the effect of the acceptance of these contracts for filing, relied on so heavily by United (p. 4 of its motion papers) constitute no more than a restatement of the legal rights of the Commission to modify or abrogate contracts under Section 5(a), which we have at all times conceded.

(3) Under subheading 4 of the motion papers, at pages 8 through 12, United argues that certain documents relating to Mobile's petition to intervene in the consolidated proceedings now pending before the Commission, in which United's general rate structure is under review, should be included in the certified record. The items are listed as numbers 15 through 19 in Exhibit "A" of the moving papers.

The fact that United filed a petition to intervene in these proceedings and that its petition was granted is fully set forth in the pleadings and was recognized by the Commission in the order under review. Moreover, in that order the Commission made the very point now raised by United: That even though the filing of rates over and above the contract rates was legal and proper, Mobile still had a right to urge in the consolidated proceedings that the proposed increased rates were unreasonable, and to argue that the contract rates were reasonable (A. 6a-7); but, as United itself points out at page 10 of its motion papers, it could only make this argument "because they [the contract rates] were just and reasonable, and not because they were contained within a contract."

[fol. 231] This issue, of course, begs the very question raised in the present proceeding. There has never been any question that Mobile could attack the reasonableness of the increased rates in the consolidated proceedings, regardless of whether or not it had a contract. That is the right of any purchaser when the natural gas company files a schedule of increased rates under Section 4 of the Act. The point which Mobile is raising in the present proceeding is that, precisely because it has a contract, it is in a different and better position than that of ordinary rate payers who have no contracts. It is Mobile's contention that it may rely upon its contract and that its rates may be not be increased *until and unless* the commission after a hearing shall find that the contract itself is so unreasonable or harmful that the public interest requires that it be abrogated or modified.

The difference between Mobile's position and that asserted by the Commission and United on this point is the crux of the entire controversy. The question is whether

Commission in this proceeding, but as to which no supporting allegations of fact are contained in the pleadings.*

We submit that it follows that United cannot now attempt to raise in this proceeding an issue which, even if it has any merit, it could properly have raised in the proceeding in which the order under review was entered, but which it expressly failed to raise at that time.

[fol. 238] Conclusion

The question at issue in this proceeding to review is a simple question of statutory construction: Does the Natural Gas Act automatically render all private rate contracts void *ab initio*, or does it merely render them voidable after a finding that the public interest requires that they be modified or abrogated?

If rate contracts are void *ab initio*, then concededly Mobile has the burden of attacking the reasonableness of the proposed new rates in the consolidated proceedings and of establishing the reasonableness of the contract rates. If the contract is only voidable, Mobile's only burden is to defend the reasonableness of its contract if it is attached in the consolidated proceedings—and in the meantime it need not pay more than the contract rate.

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* We should like to point out that in any event United's repeated assertions in its motion papers "that the filing of a conversion tariff required by the Rules and Regulations of the Commission which rendered abandonment of a contract as such compulsory" (motion, p. 7) is squarely contradicted by the Commission's own interpretation of its rules requiring conversion:

> "As stated in Order No. 144, Section 154.85 of the newly amended regulations expresses 'the Commission's intention to permit contracts now on file as effective rate schedules to continue in effect as executed service agreements until they expire or are superseded.' The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." F. P. C. Order 12/21/48 (CCH Utilities Law Reporter, Federal Transfer Binder, p. 9477).

If rate contracts are void *ab initio*, the question whether or not Mobile's contract was abrogated by the conversion order in 1952 is moot. If Mobile's contract is only voidable, United has ample opportunity to raise its newly asserted contention that the contract was abrogated by the conversion order, when attacking the reasonableness of the contract in the consolidated proceedings.

Thus, even if they were otherwise legally admissible, the issues sought to be raised by United on the basis of the [fol. 239] documents it seeks to add to the record are issues which cannot arise until the question raised by the present petition to review has been resolved. After this Court has authoritatively decided whether or not Mobile's contract is void or voidable, these issues can be presented to and passed upon by the Commission. But until they have been so passed upon, they cannot be "reviewed" by this Court.

The facts raised by the pleadings before the Commission are amply sufficient to raise the legal question of statutory construction here involved. No additions to the record are either necessary or proper on this review of the Commission's order.

The motion should be denied in all respects, except as to the contracts incorporated by reference in Mobile's original petition, which are listed as items 2, 4, 6 and 8 in Exhibit A to the moving papers.

Respectfully submitted, Winthrop, Stimson, Putnam & Roberts. Winthrop, Stimson, Putnam & Roberts; Johnston, McCall & Johnston, Attorneys for Petitioner, Mobile Gas Service Corporation.

April 19, 1954.

Mobile's contract is valid until it is set aside upon a finding of unreasonableness, or whether its contract is valueless because it may be abrogated at any time, unilaterally, so that Mobile is in no better position than any other rate payer. In the latter case it can only appear in the con-[fol. 232] solidated proceedings, where it has the burden of establishing the reasonableness of the contract rates. If a contract is valid, however, it is United which must proceed in the consolidated proceedings under Section 5(a) of the Natural Gas Act, and bear the burden of establishing to the satisfaction of the Commission that the contract is so unreasonable that it must be set aside. In such a proceeding, of course, United has the burden of proof, and Mobile is quite prepared to meet the issue on that basis.

As a practical matter, the difference between these two positions is of vital importance. The consolidated proceedings were commenced in 1948, and at the present date United has not yet completed its affirmative case in defense of its proposed rate increases. As a result of the procedure adopted by United and approved by the Commission in the order under review, Mobile since July 25, 1953 has been paying 14.5¢ per MCF for gas which under its contract with Ideal it is obligated to resell for 12¢ per MCF, and, if the Commission's order is not reversed, Mobile will have to continue to do so until the eventual termination of the consolidated proceedings—or until it is bankrupt. Moreover, under the Commission's order here under review, Mobile is denied even the minimal right of an order of refund even if it should ultimately succeed in establishing the reasonableness of its contract rates.

[fol. 233] Finally, the burden placed upon Mobile of establishing the reasonableness of the contract rates in the consolidated proceedings "because they [are] just and reasonable and not because they [are] contained within a contract," as contended by United at page 10 of its motion papers, is by hypothesis an insurmountable burden. For it was contemplated at the time the contract was entered into that the rates would be lower than the "reasonable rates" to which United would be normally

entitled, for the purpose of obtaining the business of the Ideal Cement Company. It is obvious, therefore, that Mobile's contract rights can not be protected in the consolidated proceedings.

It follows that nothing can be added to the issues in the present proceeding by including upon the record herein matters relating to the consolidated proceedings. There is no controversy either as to what is involved in those proceedings or as to Mobile's right to appear therein. The question at issue is whether Mobile has a totally different right, which is not available to it in those proceedings, to insist that its contract be enforced until and unless set aside as provided under Section 5(a) of the Act. Thus, there is no possible justification for the inclusion of these documents in the pending proceeding.

[fol. 234] (C) *Documents which were not before the Commission and which raise issues neither presented nor passed upon in the order under review.*

In its subheading 3, at pages 5 to 8, United asks that certain documents relating to the filing of what it describes as a "conversion tariff" in the year 1952, including certain provisions of that tariff and an order of the Commission approving the same (Exh. A, items 12, 13, 14), be included in the transcript of record because United now contends, for the first time so far as we are aware, that the effect of that conversion tariff and order was to abrogate or modify the very contract the legal effect of which constituted the sole issue in the present proceeding. An examination of the pleadings and of the Commission's order herein will disclose that in its petition Mobile referred to the conversion tariff as follows (A. 14a-15):

> "On or about May 29, 1952, United filed with the Federal Power Commission a restatement of its FPC Gas Tariff, as Original Volume No. 1. Among other things, said tariff included Rate Schedule Ind-3J. This schedule, which was comprised of Original Sheets No. 43 and No. 44 of said Original Volume No. 1, was for sales to Mobile for resale to Ideal, and specified that the rate for such sales was 10.7 cents per MCF for all natural gas sold by United to Mobile

for resale to Ideal. *Mobile was advised by United that the filing of this rate schedule carried out only a restatement of United's existing contract rate.* As a practical matter, the rate specified in the new tariff was virtually identical with that which United had contracted to charge Mobile for gas sold to Mobile for resale to Ideal." (Italics supplied)

[fol. 235] United's answer referred to this so-called conversion tariff at page 34a in the following language:

> "In accordance with the provisions and requirements of the Rules and Regulations of this Commission, United filed on or about the 3rd day of July, 1952, its FPC Gas Tariff converting all contracts and contractual agreements for service and rates into tariffs as provided by the Rules and Regulations of the Commission, one of such contracts so converted into tariff form was the contract and all supplements and amendments thereto described in Paragraph II hereof. Said conversion tariff, together with the service agreement supporting the same, superseded all of the terms and provisions of said original contract and supplements thereto except those provisions expressly retained as permitted by the Rules and Regulations of this Commission and thereby became the only lawful basis for service and the rates and charges to be made therefor lawfully chargeable by United to Mobile for the service and sales covered by said tariff."

Thus it will be observed that while United alleges that the said conversion tariff modified the original contract in some respects, it does not specify in what respects it was so modified, and therefore does not controvert Mobile's allegation that the said conversion tariff modified the said existing agreement only to the extent of converting the rates provided for therein from a percentage to a dollars and cents basis.

Moreover, after reciting these and other facts, United's answer proceeded to list nine separate reasons in support

of its contention that, as a matter of law, the existing contract between Mobile and United did not prevent United from presently increasing the contract rate by merely [fol. 236] filing a schedule of higher rates under Section 4 of the Natural Gas Act (A. 36a-40). Not one of these arguments bears any relation to the contention United now seeks to raise, to the effect that filing of the so-called conversion tariff in 1952 in some way modified the portions of the contract out of which the issue passed on by the Commission arose: United's agreement to sell gas to Mobile for resale to Ideal at a fixed rate for a term of years. On the contrary, all of United's arguments are directed solely to refute Mobile's contention that, as a matter of law, under United's construction of the Natural Gas Act, such a contract, even though valid and subsisting as a contract, could be abrogated by the filing of a higher rate under Section 4.

Finally, that no such issue was ever raised before or passed upon by the Commission is apparent from the Commission's order in which the only reference to the conversion tariff is as follows (A. 5a):

> "* * * On July 3, 1952, United filed a restatement of its FPC Gas Tariff, Original Volume No. 1, in which, without altering the contract provisions, United's rate to Mobile for resale to Ideal was stated to be 10.7 cents per Mcf."

Thus, we submit that it is quite apparent that the order under review was based on the uncontroverted allegation in the petition that the contract was unaltered by the 1952 order, except to the extent that the rate was converted from a percentage to a dollars and cents basis.

[fol. 237] United's present contention that this conversion tariff in some way altered the basic rights of the parties in so far as they were at issue before the Commission in this proceeding—that is to say, in so far as their validity in the light of Sections 4 and 5 of the Natural Gas Act are concerned—is thus an entirely new and different contention, an afterthought which not only was never presented to the

[fol. 240]. [File endorsement omitted.]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

RESPONDENT'S ANSWER AND OBJECTIONS TO INTERVENOR'S MOTION FOR AN ORDER DIRECTING RESPONDENT TO CERTIFY ADDITIONAL DOCUMENTS—Received & Filed, April 19, 1954.

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, Federal Power Commission objects, in part, to the motion filed by Intervener, United Gas Pipe Line Company, requesting that this Court direct Respondent to certify additional documents other than those documents certified by Respondent to this Court on April 9, 1954.

As shown more fully in the attached Memorandum in Support, Respondent certified to this Court a transcript of the documents filed in the proceeding at Docket No. G-2227. Such certified transcript contained all of the documents upon which the order complained of was entered, as required by Section 19(b) of the Natural Gas Act. It was filed within the time prescribed by Rule 18(6) of this Court. [fol. 241] A scrutiny of the pleadings in the proceeding indicates that the documents listed in Items 2, 4, 6, and 8 of Appendix "A" to Intervener's motion had been incorporated by reference in the petition of Mobile Gas Service Corporation in the proceeding at Docket No. G-2227, and appear properly to be a part of the transcript of the documents in this proceeding. A supplemental transcript containing such documents has been forwarded to this Court.

WHEREFORE, Respondent respectfully moves this Court for an order denying Intervener's motion, except to the extent heretofore noted.

Respectfully submitted, /s/ Willard W. Gatchell, General Counsel, Lambert McAllister, Assistant General Counsel, Louis L. Da Pra, Attorney, Sherman S. Poland, Attorney, Counsel for Respondent, Federal Power Commission, Washington 25, D. C.

[fols. 242-247] [File endorsement omitted.]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING MOTION FOR CERTIFICATION OF ADDITIONAL MATERIAL—filed April 19, 1954

Upon consideration of the motion by United Gas Pipe Line Company, intervenor, for certification by respondent of additional material as a supplemental transcript of record; and of the memoranda filed in support of and in opposition to the motion; and after hearing;

It is ORDERED that the motion be, and it is hereby denied.

By the Court, Goodrich, Circuit Judge.

April 19, 1954.

[fol. 248] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

UNITED GAS PIPE LINE COMPANY, Intervener

On Petition to Review an Order of the Federal Power Commission

Argued May 19, 1954

Before McLAUGHLIN, STALEY and HASTIE, Circuit Judges.

OPINION OF THE COURT—Filed September 7, 1954

By McLAUGHLIN, Circuit Judge.

In this proceeding to review an order of the Federal Power Commission the basic question is whether the Commission is correct in holding that under the Natural Gas

Act[1] a natural gas company can in effect wipe out a filed rate contract simply by filing an increased rate schedule. Substantially that is what the Commission considers to have happened to petitioner's contract with intervener.

[fol. 249] Mobile Gas Service Corporation, the petitioner, is an Alabama distributor of natural gas. It receives its entire supply of that fuel from the intervener, United Gas Pipe Line Company, a Delaware corporation.[2] By a 1936 contract between it and United's predecessor and an agreement entered into in 1941 with United itself certain of Mobile's gas for resale industrially was to be supplied by United for 90% of Mobile's gross resale revenues. The contract provided that the gas was not to be resold industrially for less than 16¢ per MCF (1,000 cubic feet) without United's consent. This agreement as amended by the 1941 contract was to continue in effect until 1962. Both contracts were filed with the Commission and became United's Gas Rate Schedule #20 and Supplement to that Schedule #7.

In 1946 United agreed with Mobile to a proposed arrangement between Mobile and Ideal Cement Company whereby the latter could be supplied with its industrial gas needs by Mobile for 12¢ per MCF for a period of ten years provided total deliveries remained between 100,001 and 400,000 MCF per month. In accordance with this United consented to accept the percentage rate of Mobile's sales to Ideal though this would be less than the minimum of 16¢ per MCF. United also agreed at that time to reduce the price of industrial gas to Mobile from 90% of the latter's gross resale revenues to 80% up to 41,667 MCF per billing month and 90% in excess thereof. Those agreements were filed with the Commission as Supplements #9 and #10 to United's Rate Schedule #20. Mobile then consummated its proposed contract with Ideal Cement Company to supply gas to the latter for ten years at 12¢ per MCF. The Alabama Public Service Commission approved that contract. Not only United but the Commission recognized the

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[1] 52 Stat. 821-833; 15 U.S.C. Section 717-717w (1952).

[2] Jurisdiction is obtained by reason of Section 19(b) of the Natural Gas Act. 52 Stat. 831; 15 U.S.C. Section 717r (b) (1952).

contract as late as July, 1952 when the Commission allowed United to substitute in its filed tariff a flat rate of 10.7¢ per MCF in place of the percentage rate Mobile had been [fol. 250] paying. As United advised Mobile, this substitution was made under the Commission directive to convert from percentage to fixed sum and was almost identical with the amount the Mobile percentage rate actually figured.[3]

On June 24, 1953, United filed with the Commission proposed increased rates, including a rate of 14.5¢ per MCF for industrial use gas for Mobile. On July 10, 1953, the

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[3] In Tyler Gas Service Co. v. United Gas Pipe Line Co., D. C. Tex., Dec. 23, 1953, unreported, (on appeal, 5th Cir.), United had agreed to just such an arrangement as Mobile made with Ideal—that is the furnishing of natural gas at a reduced rate. There the period was sixteen years.

In that suit there was a denial of an application for an injunction to prevent United from moving before the Commission for permission to collect its new rate for domestic use gas until the reasonableness of that rate had been finally determined by the Commission. There was a contract involved but it had already been modified in what seems to have been an adversary proceeding. According to the opinion of the district judge the "* * * plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates. * * *." The all important question before us of whether there should be a hearing on the reasonableness of an existent unchanged approved contract prior to the acceptance for consideration of the new rate and prior to the determination of the reasonableness of that new rate was not before the court.

It should be emphasized also that the fact that Tyler concerned a rate for sale of gas for domestic use of itself sets that action apart from the issue of this appeal. In Tyler under Section 4(e) the Commission could and did suspend the effective dates of the increased rates for five months after which period it could order any subsequent collections to be held subject to refund in the event the new rates were ultimately found to be unlawful.

Commission ordered a hearing on the lawfulness of those rates, suspended them pending the hearing with the exception of the new Mobile rate, and ordered that hearing to be consolidated with an earlier proceeding investigating all of United's rates. The new rate for Mobile being for industrial use was not subject to suspension under Section 4(e) of the Act. As a result it became operative July 25, 1953. Mobile, on July 16, 1953, attempted to intervene in the consolidated proceeding. On August 4, 1953, it filed a petition with the Commission setting up the above situation and asking the Commission to amend its order of July 10 so that United's new filing in so far as it affected the Ideal contract would be rejected and the 14.5¢ rate would not be permitted to take effect. In the alternative it requested a hearing on the lawfulness of the filing of that rate and [fol. 251] asked that if Mobile was obligated to pay United the increased rate, United be directed to hold those payments subject to refund to Mobile in the event the new rate was ultimately determined to be unlawful. At that stage no action had been taken on Mobile's application to intervene and the new rate had been governing since July 25th. As a consequence Mobile amended its petition and urged the Commission that it be made a separate cause. That prayer was granted as was United's later petition to intervene in the new proceeding. On December 7, 1953 the Commission on the pleadings denied the prayers of Mobile's petition and dismissed it. On February 4, 1954, the Commission refused rehearing to Mobile. This petition for review of the Commission's decision followed.

Mobile's main point is that its United contract with respect to Ideal is a valid agreement which cannot be set aside by United's unilateral action of filing an increased rate schedule. It frankly recognizes the Commission's paramount authority and concedes that if after a proper proceeding the Commission found the contract rate to be against the public interest it could modify it or set it aside entirely.

The Commission contends that where a natural gas company files a rate schedule under 4(d) of the Act that rate is to be charged unless suspended initially or disapproved finally by the Commission after investigation and hearing; rates for industrial use not being subject to sus-

pension when filed become effective thirty days thereafter until finally passed upon by the Commission. The latter insists that even where as here the rate conflicts with an admittedly preexisting filed contract the distributor is given no chance to defend its contract, on which it has made approved commitments, before that contract is to all practical purposes abrogated.

It is undisputed that under the ordinary 4(e) proceeding which the Commission has instituted with reference to the new rate schedule involved the dispositive question be- [fol. 252] fore the Commission is whether the increased rates are just and reasonable. 4(e) makes this plain when it says:

> "* * * At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

In other words if in the pending hearing United can show that its new filed rate for Mobile is reasonable that ends the matter and the new rate stands. No consideration will be given to the accepted contract, the circumstances under which it was entered into, the long term commitments sanctioned by the Commission and whether the rate fixed by it is unreasonable and against the public interest under the facts. What petitioner is endeavoring to do is have its contract passed upon in the first instance prior to authorization for filing of United's new rate and the consideration of whether that rate is currently reasonable.

The Commission maintains that 4(d) of the Act[4] up-

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[4] Section 4(d) of the Act reads as follows:

> "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commis-

holds its stand. That section provides, as far as we are primarily concerned, that "no change shall be made by any natural-gas company in any such rate * * * or *contract* relating thereto, except after thirty days' notice to the Commission and to the public." (Emphasis supplied). This [fol. 253] means, according to the Commission, that since under 4(e) it does not have the power to suspend an industrial use gas rate, United can fundamentally cancel the Mobile contract despite the fact that as of now Mobile is bound for its duration to Ideal, subject only to the Commission later passing finally upon the rate. And in the Commission thought this can take place without any statutory notice to Mobile or an opportunity for Mobile to be heard regarding its contract rate. The practical result of this is that Mobile in living up to its contract with Ideal is supplying natural gas to that company for 12¢ per MCF and may well be forced to continue to do so until the expiration of its contract in 1956. Meanwhile Mobile must pay United 14.5¢ per MCF for the same gas it delivers to Ideal though its contract with United has never been questioned by the Federal Power Commission or in any way construed to be against the public interest.

The Commission and intervener rely to a large extent upon Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372 (1919), and Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109 (1937). The first case is quoted by the Commission as holding at page 375: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." The principle stated is of course sound law and is expressly un-

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sion and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

controverted by petitioner. In the Union litigation there had been a hearing before the Georgia Commission on the question of the reasonableness of the contract rates. The Commission found that they were unlawfully discriminatory. Here, as we have seen, Mobile had no opportunity to defend the contract rate prior to the new rate coming into being.

Midland does lend some support to the position of the Commission and the intervener. But there the rates filed by the utility were not opposed and were permitted by the [fol. 254] Missouri Utility Commission without hearing.[5] Far more important than that the decision is based upon a state court interpretation of a state statute. The question litigated and passed upon was whether a Missouri statute as construed by the Missouri Supreme Court violated the federal constitution. That sort of problem is not presented in this action.

Another case involving a state court explanation of a state law is Wichita R. R. v. Public Utility Commission, 260 U. S. 48 (1922).[6] That came into the federal courts through diversity of citizenship and as far as it goes affords strong help to petitioner. In it the Kansas Commission without any finding of unreasonableness and despite a duly filed contract for the sale of electric power, authorized a surcharge. The railroad had appeared in the Commission proceeding and had objected. The matter was removed to the

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[5] A very real distinction exists between the position of the realty company in Midland and that of the present petitioner. Hearings were held on similar contracts and the latter found unreasonable prior to the utility company's suit against Midland being disposed of and Midland had not appeared in those hearings. In other words Midland made no attempt to attack the new rate directly before the Commission but contented itself with raising a defense in a collateral proceeding brought by the utility company.

[6] See also Attleboro Steam & Electric v. Narragansett Electric Lighting Co., 295 Fed. 895 (R. I., 1924) construing a similar Rhode Island statute.

United States District Court which restrained execution of the Commission's order.[7] The Eighth Circuit reversed.[8] The Supreme Court upheld the district court, quoting with approval from the opinion of the Kansas Supreme Court in Kaul v. American Independent Telephone Co., 95 Kan. 1, 147 Pac. 1130 (1915) where it is stated that:

> "* * * The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the con- [fol. 255] tract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The Kansas procedure as to rates bears great similarity to the Natural Gas Act formula. Under Section 20 of that state's public utility statute[9] a public utility may file higher rates. Section 13 of the law empowers the Commission to set aside rates which after hearing have been found to be unreasonable. It is under the parallel provision in the Natural Gas Act, (Section 5(a)) that petitioner contends the Commission should have functioned in passing upon United's attempt to obtain a higher rate for its gas sold to Mobile for the industrial user Ideal. Section 5(a) reads:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or

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[7] Wichita's motion for judgment on the pleadings was granted. There was no reported opinion.

[8] 268 Fed. 37 (8th Cir. 1920).

[9] Public Utility Law of Kansas, Session Laws of 1911, c. 238.

classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a [fol. 256] decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Section 5(a) was before the Tenth Circuit in Colorado Interstate Gas Co. v. Federal Power Commission, 142 F.2d 943, 954 (1944), affd. 324 U.S. 581 (1945). In that case on complaint of the City and County of Denver and the State of Wyoming the Commission held that existing rates and contracts were unreasonable. The gas companies claimed that the finding was not founded on substantial evidence. The Court said:

"* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness. Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F. 2d 881. And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431."

The Commission suggests that the Colorado decision is not applicable because the proceedings were under Section 5 but we fail to note any contradiction of the court's statement that filed contract rates and charges can only be set aside on an express finding of unreasonableness which [tol. 257] in turn specifically follows the very opinion (Wichita) that the Commission asserts turns on a peculiar Kansas law. Actually the Commission time and again insists that it does not claim that the Congress in the Natural Gas Act intended to set aside contracts completely. It states flatly that the Act shows no such thought. Nevertheless on the theory of "scheme of regulation" it argues that it be permitted to construe Section 4(d) so that in reality that consequence is obtained. In F.P.C. v. Niagara Mohawk Power Corp., 347 U.S. 239, the Supreme Court made it abundantly clear that such authority "requires clear authorization", which is absent from the Natural Gas Act. In the Niagara Mohawk litigation the query was whether the Federal Water Power Act of 1920 had abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. The Supreme Court interpreting that statute said at p. 251:

> "* * * We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. * * * On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties."

So here, the Natural Gas Act does not expressly permit existing contract rights to be abolished by a mere unilateral filing of new rates. The plan of the Natural Gas Act is likewise one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable.

Beyond question the Commission's action in this instance would result in further impairment of petitioner's common law rights. As the Supreme Court stated in Texas

[fol. 258] and Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907), a case cited by intervener but interpreting the Interstate Commerce Act:

> "* * * a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

See Shaw v. Railroad Co., 101 U.S. 557, 565 (1879); American District Telegraph Co. v. Kittleson, 179 F. 2d 946, 953 (8th Cir. 1950); 3 Sutherland, Statutes and Statutory Construction (3rd ed. 1943) 164-182.

Nor is a rate contract automatically nullified merely because the return is low. In this instance there seems no doubt but that the Ideal Cement account represented important new business to Mobile and to United and that the long-range price concession was made in order to obtain it. Cf. Arkansas Natural Gas Co. v. Railroad Commission, 261 U.S. 379 (1923); Railroad & Light Co. v. Court of Industrial Relations, 13 Kan. 217, 214 Pac. 797 (1923). And the fact that the Commission can change the contract does not render it void for lack of mutuality. Southern Utilities v. Palatka, 268 U.S. 232 (1925); Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 64 F. 2d 881 (10 Cir. 1933).

With reference to the pertinent legislative history regarding such contract as before us, all three of the parties quote the colloquy between Congressman Halleck and Mr. Booth, appearing for the Illinois Public Service Commission on the bill which immediately preceded the Natural Gas Act. The accurate report of this reads:

> "Mr. Halleck: Of course, it is your idea that if this bill should pass and the Commission be given the [fol. 259] authority contemplated in this bill, that the contract *could* be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?
>
> "Mr. Booth: That certainly would be my position and we certainly would ask the Federal Power Com-

mission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return upon the fair value of its property." (Emphasis supplied).

Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H.R. 4008, at page 43.

The reasonable inference from the above is identical with petitioner's theory, namely, that the Commission has the power to eliminate a private contract; not that the latter is automatically destroyed by the unilateral action of a party thereto.[10]

There is no mention in the debates of Congress that the Act was ever intended to permit a contracting party to eliminate its existing contracts simply by giving thirty days' notice to the public and to the Commission. Instead the Act was stated to contain the "usual provisions * * * such as we find in all regulatory measures enacted by Con-

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[10] The intervener cites Armour Packing Co. v. United States, 209 U.S. 56 (1908), for the point that Congress intended the scheme of the Act to replace every other device, including contract provisions. That case was under the Elkins Act amendment to the Interstate Commerce Act. As the opinion itself states that amendment was adopted to make certain that all shippers be given the same treatment with one rate for a similar carriage of freight. The court also made clear that the Interstate Commerce Act contained no provision for the filing of contracts with shippers. The lack of recognition of that type of agreement in the Interstate Commerce Act was for the consideration of Congress stated the Court. Commenting on the omission of the Interstate Commerce Act to provide for private contracts the Court said at page 82: "It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done." As we have seen this possible course outlined by the Supreme Court in Armour has been followed in the later Natural Gas Act.

[fol. 260] gress",[11] and according to the Committee report, there was "nothing novel in its provisions."[12] It should also be noted that there was virtually no opposition to the bill from any source.[13]

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[11] 81 Cong. Rec. 6722 (1937):

"Mr. Lea: * * *

"There are the usual provisions. Without attempting to go into detail, what I call usual provisions are those such as we find in all regulatory measures enacted by the Congress. This bill contains, for instance, administrative provisions; for rules affecting just and reasonable rates; for the power of the Commission to fix maximum or minimum rates or a specific rate after hearing; for the rule against discriminations and preferences as between consumers or localities; for the requirement that the schedules be kept open for public inspection; for the power of the Commission to suspend the rates where deemed unduly high. The bill covers the question of accounting, following standard lines; of giving the Commission the power to control the accounts, including the depreciation account; and of requiring the gas companies under the regulation of this bill to conform to those accounting practices.

* * * * * * *

"The bill makes provision for complaints and provides for hearings and has the usual provisions in reference to the production of testimony and rehearings by the Commission on petition, court review of the orders of the Commission, and, a rule, that the findings of the Commission, if supported by substantial testimony, are conclusive upon courts in connection with questions that may be taken to courts.

"Those are what might be called the principal provisions of the bill."

[12] H. Rep. No. 709, 75th Cong., 1st Sess., p. 3. See Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581, 601 (1945).

[13] 81 Cong. Rec. 6725 (1937):

"Mr. Mapes: Mr. Chairman, as far as I know, there is no opposition to this bill. I do not know of any member of the House or anyone else who opposes it. It is

The Commission itself in its brief says:

> "The reports of the Federal Trade Commission on the natural-gas industry abound with references and data concerning the contracts of gas companies most of them for long terms. It was at the time of the passage of the Act, and is now, a common and usual practice for such gas companies to contract for all sales or transportation of natural gas. Those companies which sold otherwise were exceptions."

[fol. 261] This being so one would think that there would be at least some debate on a provision which provided for the lawful unilateral cancellation of that type of agreement if Congress had that in mind.[14]

The Commission also makes much of the provision in Section 4(e) which prohibits the Commission from suspending rates for the sale of natural gas for resale for industrial use. The purpose of this provision, however, as stated by the Congressman who introduced the amendment, was "to prevent suspension in cases of industrial use *where there are short term contracts* * * *."[15] (Emphasis supplied). The clear implication is that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates. The implication is equally

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supported by the public utility commissions of the States and by all public bodies, as far as I know, who have anything to do with or have given any particular attention to the question of the distribution and sale of natural gas to the consuming public. As a matter of fact, my attention has not been called to any opposition to it, even on the part of the gas companies themselves."

[14] The Commission points to certain evidence of the Commission's solicitor on a predecessor bill as demonstrating the intent to make filing procedure controlling irrespective of the contractual situation. There is nothing in that testimony from which it can be fairly concluded that the kind of contract before us was within the contemplation of the witness or his examiners.

[15] 81 Cong. Rec. 6727 (1937).

clear that Congress did not visualize the present circumstances where one of the contracting parties is attempting under the cover of the Act to avoid its contractual duties.

The Commission's order under review refers to Part 154 of the Commission's Regulations under the Act. Those Regulations give no assistance to the Commission's interpretation of Section 4. The very section of the Regulations under which United filed its conversion schedules [16] in May, 1952 reads as follows:

> "Section 154.85. *Status of contracts filed as rate schedules and restated.* Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable [fol. 262] provisions of the rate schedules and general terms and conditions of the tariff, *until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: *Provided, further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.*" (Emphasis supplied in part).

United's filing on June 24, 1953 did attempt "to effect a change" in an unexpired contract without "the execution of a form of service agreement contained in the tariff."

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[16] There is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate. The latter as has been mentioned was substantially the same as the old percentage rate and inferentially became a part of the unchanged contract.

This case is therefore distinguishable from Mississippi River Fuel Corp. v. Federal Power Com'n, 202 F. 2d 899 (3rd Cir. 1953), where we held that all the filing requirements had been complied with and where there was apparently no existing filed contract. Moreover, we assumed for the purposes of that case "that the Commission has the power, implied from its authority to make rules and regulations, to reject a proposed filing which does not conform to such rules and regulations." *Mississippi River Fuel Corp. v. Federal Power Com'n, supra* at 901. See 18 CFR Section 154.24.[17]

In view of the above language in the Commission's own Regulations and of the complete absence of suggestion in the statute or in the legislative history that the Act was intended to authorize the abrogation of existing con- [fol. 263] tract rights by means of the unilateral substituted gate procedure, we hold that the Commission erred in not rejecting United's Revised Sheets Nos. 39 and 40 in so far as they affected the Ideal contract. To do otherwise would be an attempt by us to legislate judicially since the construction of 4(d) as contended for by the Commission and the intervener is not warranted by the statutory language. *F. P. C. v. Niagara Mohawk Power Corp., supra.* Any changes in 4(d), particularly of the radical nature urged, would be for the consideration of the Congress, not for this court.

With this holding it becomes unnecessary for us to consider Mobile's alternative contention that even if the revised schedule be accepted for filing a subsequent separate hearing be held on the lawfulness of the filing at which time the reasonableness of the prior contract rate would be passed upon. Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies collected after the acceptance of such filing be held subject to refund. Since we are specifically holding that the pertinent part of the order of July 10, 1953

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[17] "Section 154.24. *Rejection of material submitted for filing.* The Commission reserves the right to reject any material submitted for filing which fails to comply with the requirements set forth in this part [Section 154]."

was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile. *B. & O. R. Co. v. United States*, 279 U.S. 781 (1929); Restatement, Restitution, Section 74 (1937); cf. *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U.S. 134 (1919).

Those parts of the Commission's order which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, will be reversed.

[fol. 264] HASTIE, Circuit Judge, dissenting

The Commission's order of July 10, 1953 was lawful and proper under the terms and scheme of the Natural Gas Act. This court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent.

[fols. 265-282] [File endorsement omitted.]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent

Present: McLaughlin, Staley and Hastie, Circuit Judges.

JUDGMENT — Filed September 7, 1954

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and

adjudged by this court that those parts of the order of the Federal Power Commission which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, be, and the same are hereby reversed.

Attest: Ida O. Creskoff, Clerk.

September 7, 1954

[fol. 283] [File endorsement omitted]

In United States Court of Appeals

Mobile Gas Service Corporation, Petitioner

vs.

Federal Power Commission, Respondent

United Gas Pipe Line Company, Intervener

Order Staying Issuance of Mandate—Filed October 2, 1954

The issuance of the mandate in this case will be stayed to and including November 8, 1954.

By the court, McLaughlin, Circuit Judge.

October 2, 1954

[fol. 284] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 285-286] SUPREME COURT OF THE UNITED STATES

FEDERAL POWER COMMISSION, Petitioner,

vs.

MOBILE GAS SERVICE CORPORATION, UNITED GAS PIPELINE COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed November 29, 1954

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 4, 1955.

Harold A. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 29th day of November, 1954.

[File endorsement omitted.]

[fols. 287-288] SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY, Petitioner,

vs.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION

ORDER ALLOWING CERTIORARI—Filed February 28, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

{fols. 289-290} SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1954

No. 556

FEDERAL POWER COMMISSION, Petitioner,

vs.

MOBILE GAS SERVICE CORPORATION

ORDER ALLOWING CERTIORARI—Filed February 28, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1847-3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 7, 1954 (App. 17) reversing judgment and decision of Respondent Federal Power Commission[1] entered in Docket G-2227 against Respondent (App. 18)[2] and ordering the Commission to reject a filing by Petitioner in a different proceeding, under Section 4 of the Natural Gas Act[3] and to order refunds by Petitioner to Respondent Mobile Gas Service Corporation of amounts collected under such filed rates.

Opinions Below

The Commission issued an order containing its opinion and conclusions (App. 18). The majority and dissenting

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[1] Referred to hereafter in this petition as the Commission; Mobile Gas Service Corporation, referred to hereafter as Respondent.

[2] The record certified from the Court below will be referred to as R, the appendix to this petition, as App.

[3] Hereinafter called the Act.

opinions of the Circuit Judges of the Court of Appeals (not yet reported) styled *Mobile Gas Service Corporation* v. *Federal Power Commission*, are contained in the appendix filed herewith (p. 1-16).

Jurisdiction

The judgment of the Court of Appeals was entered September 7, 1954 (App. 17). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

Urged as reasons for granting petition.

1. Whether Congress in enacting, pursuant to the Commerce Clause, the complete and exclusive scheme of regulation of the Natural Gas Act, intended and provided that a private contract fixing rates subject to the jurisdiction of the Federal Power Commission and filed with said Commission as a rate schedule, should render inoperative and unenforceable the filed rate provisions of Section 4 of said Act so that a natural gas company cannot make or file with the Commission the change in rates contemplated and required by Section 4(d), and so that the Commission cannot permit or accept, but must reject, the filing of change in rates by the natural gas company until first such private contract is set aside as against the public interest in a proceeding brought for that purpose.

2. Whether Congress in the Natural Gas Act has empowered the Federal Power Commission by its own order, or authorized the courts to direct the Commission by order, to require refund of monies collected from a change in rates for the sale of natural gas for resale for industrial use only filed by the natural gas company pursuant to Section 4(d) of the Act, but not subject to suspension under Section 4(e) of said Act.

Statute Involved

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, Ch. 556, 52 Stat. 821, as amended; 15 U.S.C. 717, et seq) are set forth in the appendix filed herewith (p. 24-27).

Statement

The Proceeding before the Federal Power Commission

On August 14, 1946, Petitioner filed Supplement No. 10 to Supplement No. 7 of "Rate Schedule F. P. C. No. 20" with the Commission effective July 26, 1946 (R. 153). After the effective date of the Act, the original contract dated January 1, 1936, was filed as rate schedule with the Commission on August 22, 1938 (R. 111).

Supplement No. 10, dated June 28, 1946, provided for additional delivery of gas under Article VI, Supplement No. 7 (R. 137) for resale for industrial purposes only to Respondent's customer Ideal Cement Company, pursuant to a 10-year contract, reduced the price from ninety per cent (90%) to eighty per cent (80%) of the proceeds received by Respondent during applicability of its rate to Ideal, and contained a tax adjustment clause for reimbursement to Petitioner of additional taxes which might be imposed (R. 154-7).

The Commission permitted Supplement No. 10 to be filed and become effective upon this caveat:

> "Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided for in the above designated schedule, nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate" (R. 78).

The effect of the caveat was to restrict the filing of Supplement No. 10 to a rate filing, subject to changes or modifications in said rate permitted by provisions of the Natural Gas Act which the law imported into said Supplement and Contract.

Thereafter, on October 30, 1948, the Commission issued Order No. 144, amending its general rules and regulations which provided for a conversion tariff which required all rates to be stated in dollars and cents and prohibited percentage and tax agreements and adjustments which were the heart of Supplements 7 and 10.[4]

The Commission on August 1, 1952, permitted Petitioner's conversion tariff to be filed (R. 81-86). Thus, from that date forward the conversion tariff replaced and superseded the contract rate; and became the only legal and permissible rate for the service theretofore rendered Respondent by supplement 10 to supplement 7.

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[4] Under heading "Restatement of Schedules Filed Prior to December 1, 1948" (thus applicable to the original contract and supplements 7 and 10), §154.81 made the new rules expressly applicable to all "effective schedules of rates * * * and contracts for the transportation or sale of natural gas subject to the jurisdiction of the Commission filed prior to December 1, 1948" not prepared in accordance with §§154.31 through 154.41. §154.82 provided:

> "REQUIREMENT FOR RESTATEMENT. All effective schedules of rates * * * and contracts not prepared in accordance with §§154.31 through 154.41 shall be restated and filed as parts of the tariff in accordance with said sections on or before the date specified in §154.83, and duly posted at the time of filing: Provided, however, that price provisions which cannot be restated in cents or in dollars and cents per unit as required by §154.38(d) without effecting a change in rates or charges may be retained in effect without change, Provided, further, that when necessary, pending completion of restatement within the time provided for by Section 154.83 schedules may be filed in accordance with this part as in effect prior to December 1, 1948."

The required restatement pursuant to Section 154.38(d) (3) provided:

> "No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost, adjustment clauses, or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural gas company may state in the service agreement or in the rate schedules filed pursuant to §154.52 that it is or will be its privilege under certain specified conditions, to propose to the Commission a modification, change, or substitution of the then effective rate or charge: Provided, further, that no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and the regulations in this part."

On June 24, 1953, Petitioner, at Docket G-2210, filed application under Section 4(d) for increased rates including rates for gas sold Respondent for resale for industrial use only. By order issued July 10, 1953 (R. 90-94) the Commission, *inter alia*, ordered hearing on such rates applicable to Respondent, further holding they "are not subject to suspension," hearing to begin July 20, 1953; consolidated said case with several pending proceedings[5]; permitted such increased rates to become effective on July 25, 1953.

On July 16, 1953, Respondent moved to intervene in Docket G-2210, as consolislated (R. 95-7), but did not raise the contentions made here.

On August 7, 1953, in Docket G-2227, an independent proceeding[6], Respondent collaterally attacked the order of

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Section 154.85 provided:

"STATUS OF CONTRACTS FILED AS RATE SCHEDULES AND RESTATED. Each contract which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms, or is replaced by an executed service agreement in a form contained in the tariff. PROVIDED, HOWEVER, that the natural gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate which are to remain in effect; PROVIDED, FURTHER, HOWEVER, that schedules and general terms and conditions of the tariff, and agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

Statement pursuant to a 154.85 of Respondent's contract was filed as required (R. 79-80) showing the vast changes these rules wrought in Respondent's contract, aside from the caveat of the order permitting them to be filed. The Court erroneously fails to recognize these changes. Thus the contract which the Court below requires the Commission to honor is no longer operative, and has not been since July of 1952, when the Commission in Docket G-2019 permitted the tariff successor to the contract to be filed (R. 81). Respondent took no 19(b) appeal from this change in its contract by which it is bound. *Sunshine Anthracite Coal Co.* v. *Atkins*, 310 U.S. 381.

[5] These proceedings involved other rate increases for services other than the service to Respondent and also included consolidation with Docket G-1142, being an investigation under Section 5(a) of the Act instituted by the Commission October 12, 1948 (R. 88) involving all of petitioners' rates.

[6] This was first filed on August 4, 1953, in Docket G-2210, et al; but on August 7, 1953, Mobile requested deletion of the consolidated docket numbers and the granting of a separate filing with a new docket number, which the Commission granted (R. 30, 31, 25-7, 28-9, 10-25).

July 10, 1953, issued in Docket G-2210; and, in the absence of all parties to Docket G-2210 and the consolidated dockets, sought the Commission to set aside, annul or modify and amend the order of July 10, in the following particulars:

(1) Annul and set aside that part permitting the filing of first revised sheet 40 and second revised sheet 39 covering sale for resale for industrial purposes only to Respondent and substitute a rejection;

(2) Cancel, annul and set aside that part setting Docket G-2210 and consolidated dockets for hearing beginning July 20, 1953, and substitute an order severing Docket G-2210 and providing a hearing solely on revised sheets 39 and 40 applicable only to Respondent;

(3) Annul, cancel and set aside paragraph (D) and substitute a paragraph expressly denying effectiveness to revised sheets 39 and 40 on July 15, 1953; and

(4) Insertion of a new decree directing Petitioner to refund Respondent the difference, if any, between the claimed contract rates and the rates finally allowed in Docket G-2210.

The Commission, after granting Petitioner's right to intervene, correctly refused this relief upon the following grounds (R. 3-9):

(1) Rejection was denied because filing was pursuant to, and in conformity with, Section 4 of the Act, the only section by which a rate increase could be initiated, and which also prohibited suspension of industrial resale rates;

(2) No good cause for separate hearing shown while the contrary appeared, particularly due to Docket G-1142, a 5(a) proceeding investigating all rates of Petitioner, the Commission's discretion and experience being that such consolidation and joint hearing was more reasonably calculated to permit full and proper consideration, and that Petitioner had already offered its direct case;

(3) Refusal to permit revised rates to become effective would be improper; the Commission had clearly reserved both its right and intent to examine into reasonableness and propriety of the proposed rates; called attention to the caveat of Section 154.23 of its rules (generally similar to the caveat in the orders quoted above; and

(4) Denied insertion of provisions for refund because Section 4(e) permitted refunds only of suspendable rates, whereas these were non-suspendable industrial rates.

The Judgment Of The Court Of Appeals

Respondent filed a petition for review, pursuant to Section 19(b) of the Act to set aside the Commission's order (R.65). The Commission appeared in defense of its order.

On September 7, 1953, the Court of Appeals in an opinion written by Judge McLaughlin and concurred in by Judge Staley, with Judge Hastie dissenting, set aside the Commission's order which rejected Mobile's petition in Docket G-2227, and directed the Commission to amend its order of July 10, 1953, in Docket G-2210 to reject the filing of the revised sheets insofar as they affected the Ideal Cement Company contract, further directing the Commission to amend paragraph (D) thereof so as to deny permission for the revised schedule to take affect. The Court held that the Commission should have rejected the filing until it had first determined the reasonableness or unreasonableness of the "existing" contract rate, and that all monies collected on the basis of the "void" order were unlawfully collected and should be returned to Respondent (App. 16).

The dissent of Judge Hastie was:

> "The Commissions order of July 10, 1953, was lawful and proper under the terms and scheme of the Natural Gas Act. This Court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent." (App. 16)

Reasons For Granting The Writ

This is the first case in which this Court has been called upon to consider whether Section 4 of the Natural Gas Act which this Court has called the "heart of the new regulatory system",[7] establishes a comprehensive, exclusive scheme of regulation which provides that change in rates, filed by the natural gas company pursuant to Section 4(d) and permitted by the Commission to become effective as the filed rate pursuant to the provisions of Section 4(d) and 4(e), is superior to and supersedes rates fixed by private contract theretofore filed with the Commission as a rate schedule. The decision below squarely presents broad and highly important questions of interpretation of the principal affirmative provisions of Section 4 of the Act in such way, Petitioner submits, as to nullify the provisions of Section 4. Petitioner accordingly submits that the Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court, and has decided them in a way which will have such extreme effects on the administration of a vital federal statute as to call for review by this Court. Too, the decision is not only in square conflict with decisions of other Courts of Appeal in the same matters, but also presents an "intra-circuit conflict" of a type for which this Court has granted review. *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 US 507, 508; *John Hancock Insurance Co.* v. *Bartels* (1939) 308 US 180, 181. Petitioner further suggests that the Court of Appeals has reached a result not consonant with the applicable decisions of this Court.

Finally, Petitioner submits that the statutory scheme of regulation is so disrupted by the decision of the court below as to be destructive of the Congressional purpose. As the statute presently is, the natural gas company is obligated to initiate rate changes for Commission consideration pur-

[7] *Federal Power Commission* v. *Hope Natural Gas Company* (1944), 320 US 591, 611.

suant to Section 4(d), whenever and as often as necessary to meet the obligation of Section 4(a) that all rates at all times shall be "just and reasonable"; as the statute is changed by the decision below, the onus is taken from the natural gas company and placed on the Commission to institute a proceeding against each contract filed whenever and as often as necessary to meet the obligation of Section 4(a) and 5(a) of "just and reasonable" rates. Since all rates charged or services rendered subject to the jurisdiction of the Commission are necessarily by contract, whether a common law contract like Respondent's or not, the sweep of the decision below destroys all duties and rights of the natural gas company to initiate change in rates; produces a vacuum in the Act respecting this duty; and substitutes for it the Commission's duty under Section 5(a), which does not permit an increase in rates. This is an intolerable burden which the Commission clearly is not prepared to undertake.

As the statute is written, the natural gas company does not have capacity or power by private contract to prevent the comprehensive exclusive regulation provided by the Act; but as re-written by the decision below, the natural gas company may make contracts which for all practical purposes remove it from regulation under the Act. The natural gas company cannot initiate a 5(a) proceeding; the distribution company asserting a contract, could not be expected to; and the consequent burden on the Commission to initiate a 5(a) proceeding would be overwhelming, if not impossible, when considered in the light of the volume of the Commission's statutory activities. The resulting confusion and futility which would result from displacement of the statutory scheme of regulation is further illustrated by the Commission's present extension of its rate regulatory jurisdiction to independent producers. It has been estimated that there are a minimum of 6,000 contracts which

will thus become subject to such jurisdiction.[8] Under the decision below, the Commission would be forced to proceed against each contract and abrogate it as against public interest before its regulatory control attached. Congress intended that Section 4 should be the cornerstone of the Act; not that it should become the means of frustration of the even regulation intended. Petitioner submits that these matters all furnish additional appropriate reasons for granting the review requested.

Finally, the dissent of Judge Hastie pointedly states that the decision below requires the Commission to change the order of July 10, 1953 (issued in a different and distinct proceeding), in a way "to exceed its authority under the Act." Petitioner submits that this alone is warrant for this Court to grant review.

I.

The most sweeping part of the decision, and the one which, if followed, will have the most disrupting — even destructive — effect on the "new regulatory system" of the Act, is that which holds that a contract fixing rates filed with the Commission as a rate schedule is not subject to the provisions of Section 4 respecting change of rates; but renders that Section ineffective and unenforceable until said contract is abrogated as against public interest in a proceeding brought for that purpose.[9] This holding was reached by a process of reasoning founded on a misconcep-

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[8] The Commission issued order 174-A on August 6, 1954, requiring the filing by independent producers of sales contracts as rate schedules. Commissioner Digby in his dissent to such order said:

> "The order further requires all of these producers to make application to the Commission for Certificates of Public Convenience and Necessity authorizing each and every separate sale in interstate commerce. It has been repeatedly stated that there are 2,000 such independent producers. Most of these producers who are selling gas in interstate commerce will have an average of three separate sales which require a minimum of 6,000 applications for Certificates of Public Convenience and Necessity to be filed with the Federal Power Commission * * *, and this in addition to the filing of all sales contracts under the rate provisions of the order."

[9] First question presented.

tion of the purpose and meaning of the affirmative provisions of the Act and contrary to the express provisions of the Act. If carried to its logical conclusion, such reasoning destroys and repeals Section 4, for all rates depend on contract, whether "common law," by virtue of a signed service agreement, mere service acceptance, or otherwise; thus, such holding strikes down the continuing statutory duty of the natural gas company to initiate changes in rates to meet the "just and reasonable" prescription of Section 4(a) and deletes the discretionary choices given the Commission by Sections 4(d) and (e) in administering the regulatory duties exclusively given it by the Act.

1. The Court's holding seems clearly to nullify the plain language of Section 4(d) that "no change shall be made *by any natural gas company* in any such *rate* * * * or *contract* relating thereto, *except* after thirty days' notice to the Commission *and to the public*."[10] Only the natural gas company is authorized by the Act to initiate change in an existing rate. In fact, it is the duty of a natural gas company to propose such changes.[11] Section 4(d) does not, as the decision below held, prohibit a change "until first" the Commission has a "proceeding" to destroy the current rate.

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[10] The 4(d) phrase "any such rate * * * or contract" clearly refers to the Section 4(c) "Schedules showing all rates and charges * * * together with all contracts which in any manner affect or relate to such rates, charges * * *" required to be filed with the Commission. This in turn must be read with the Congressional policy set up in Sections 4(a) and 4(b) which is the only bridle on Commission freedom in considering propriety of rates. They provide that all rates under the Act shall be "just and reasonable." The language is in the affirmative, and prohibits as "unlawful" all rates not meeting this standard. "Just and reasonable" is further defined as being free from taint of "undue preference or advantage," or "unreasonable difference(s) * * * between localities * * * or * * * classes of service." Thus administrative duty under Section 4 is statutorily confined to the ever recurring and continuing duty of "just and reasonable" prospectively; not to the sterile and negative determination of "unreasonableness" or "against public interest" as the key to unlock performance of the duties enjoined by Congress upon the Commission in Section 4.

[11] *Pennsylvania Water & Power Co.* v. *Consolidated G.E.L. Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 US 906; *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.* (1951) 341 US 246; *Hope Natural Gas Co.* v. *F.P.C.* (1943 4 Cir.) 134 F. 2d 287, reversed on other grounds, 320 US 591; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* (1907) 204 US 426; *United States* v. *Illinois Central Railway Co.* (1924) 263 US 515.

It expressly contemplates change and modification in contract rates without a proceeding against current filed rates; for its forbids change by the natural gas company in "contract(s)" only where the thirty days' notice is not given. In other words, Section 4(d) expressly declares that "contracts" relating to rates shall be subject to change by the filing (and giving thirty days' notice) by the natural gas company. This notice is required solely from the natural gas company, for Section 4(d) gives discretion to the Commission to permit change in rates and contracts without notice or hearing "for good cause shown." It is the only statutory notice to which Respondent was entitled from Petitioner.

Had the Court below given this plain language the consideration it requires, it would not have declared that Respondent's contract was being changed "without any statutory notice" (App. 6). Respondent was required at its peril to obey the sanction of this notice for the provisions of the Act and the actions of the Commission thereunder respecting rates are equally binding upon it and Petitioner.[12] The Court did not define or identify in the Act the "statutory notice" referred to. There is no statutory notice defined or provided for as to change in rates or contracts affecting rates save that of Section 4(d), which here was admittedly given.

The discretion to the Commission in Section 4(d) to "allow changes to take effect without requiring the thirty days' notice herein provided for * * *" is completely destructive of the Court's reasoning, for if Congress had intended that some notice outside the Act followed by a Section 5(a), or any other, proceeding, were pre-condition to a change in a

[12] *Montana-Dakota Utilities Company* v. *Northwestern Public Service Co.* (1951) 341 US 246, affirming *Northwestern Public Service Company* v. *Montana-Dakota Utilities Co.* (1950, 8 Cir.) 181 F. 2d 19, 22; *Colorado Interstate* v. *Federal Power Commission* (1945) 324 US 581, 597; *Hope Natural Gas Company* v. *Federal Power Commission* (1943, 4 Cir.) 134 F. 2d 287, 311, reversed on other grounds 320 US 591; *Woolrich* v. *Northern Pacific Railway Co.* (1934, 8 Cir.) 71 F. 2d 732; *Watab Paper Co.* v. *Northern Pacific Railway* (1946, 8 Cir.) 154 F. 2d 436.

"contract" relating to rates, surely it would not have vested its statutory administrative agent with power to permit change and destruction of all "contract(s)" relating to rates without notice and hearing subject only to the statutory prescription "for good cause shown."

Instead the Court proceeded in the teeth of 4(d) language to require rejection and dismissal of the filing and to order refunds — all prohibited by the Act. The opinion reasoned "to do otherwise would be an attempt by us to legislate judicially since the construction of Section 4(d) as contended for by the Commission and the Intervener is not warranted by the statutory language." But to reach the result declared, the court below falls into the very judicial legislation it condemned, for there must be both deletion and addenda to Section 4(d) if the Act is to support its holding. The express direction for change or destruction of contracts relating to rates by the filing by the natural gas company followed by the thirty days' notice, and the power to the Commission to permit such change without notice or hearing, must be deleted, and there must be added provisions affirmatively ordering the Commission to reject all filings by a natural gas company if there be contract rates until such time as a hearing is had to determine whether "on the facts such contracts are against public interest." Further, there would have to be added other provisions affirmatively authorizing and ordering the Commission to require refunds.

The Court produces further confusion by failing clearly to specify under what section of the Act a hearing can be had. Obviously, not under Section 4, which gives discretion to the Commission whether there shall be a hearing, nor is the distributor-purchaser (sic, Respondent) one of the class authorized by Section 4(e) to complain and thus force choice of the administrative discretion whether to hear. The ordered rejection of filing removes possibility of a 4(e) hearing, for filing pursuant to 4(d) is essential to require

the Commission to exercise its discretion. Clearly, Section 4(e) refers only to a hearing on proposed new rates after they are filed, and gives no power over rates superseded by the proposed filing. Thus, Section 4(e) does not warrant the hearing which the holding requires.

Section 5(a) authorizes a hearing only upon complaint that a filed and effective rate is "unjust, unreasonable, unduly discriminatory, or preferential * * *." If unreasonableness be found, the Commission is empowered to lower the rate or to fix a just and reasonable rate thereafter to be charged, with express denial of power to order an increase "unless such increase is in accordance with a new schedule filed by such natural gas company." The natural gas company is not one of those authorized to initiate a 5(a) hearing by filing a complaint. It seems obvious that whether a contract should be set aside as prelude to rate regulation, as the court below holds, is not within the competence of 5(a). The Act nowhere intends or contemplates such a hearing. Section 5(a) not authorizing a hearing on whether a contract is against the public interest as prelude to a filing under 4(d), the Court holding the natural gas company is not permitted to file any increase because of a contract and the Commission being expressly denied power in 5(a) to increase a rate, the decision below effectively and completely destroys right or power to change or increase rates which are provided for in contracts.

Thus where there are contracts, the decision emasculates Section 4 entirely, and produces a gap in the Act forbidding regulation entirely. Congress did not intend this; nor does the Act so warrant, for Section 4 rightly read provides that contracts constitute no impediment, but are subject to change as any other rate. Choice of the Commission's discretion between contract or proposed rate, or any other rate level, is always embraced within the monolithic "just and reasonable." "Just and reasonable" involves an area from the lowest level (below which rates would not be just and reasonable because confiscatory) and the highest level



(above which unreasonableness would occur because too high) the plane selected being given to the exclusive discretion of the Commission.[13] Petitioner and Respondent alike are entitled to, and bound by, that rate as just and reasonable which is made specific by the Commission.[14] Neither familiar concepts nor the original cost method followed by the Commission, nor Sections 4 or 5 are based or dependent on "circumstances" or "inducements"[15] under which rate agreements are reached; rather there is involved "the

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[13] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 US 246; *Cities Service Gas Co.* v. *F. P. C.* (1946, 10 Cir.) 156 F. 2d 694, 698-9, Cert. den. 329 US 773.

[14] Thus contract filed rates may continue only so long as they occupy the plane selected by the Commission. No rate contract, fixed or otherwise, is rendered unimpeachable because "accepted" or "approved" by the Commission; nor does it thereby attain status not subject to change. *F. P. C.* v. *Hope Natural Gas Co.* (1944) 320 US 591, 615.

[15] The majority opinion refers to Respondent's contract as "recognized as late as July, 1952" (the date of the filing of increased rates) (App. 2); as an "existent unchanged approved contract"; (App. 3, Fn 3) "the accepted contract" (App. 5). It is submitted these holdings are contrary to the record. In this respect Respondent's contract is precisely like that in Tyler Gas Service Company (R. 101) discussed in Footnote 3, (App. 3) of the opinion. The record shows that the particular supplemental contract relied on by Respondent was permitted to be filed by the Commission with this caveat:

> "Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended, nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the above designated schedule, *nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate.*" (R. 77-8) (Emphasis supplied).

This is not acceptance, recognition or commitment to approval of the position Respondent claimed. It is express refusal and denial to so consider the contract, notifying Respondent that the contract is accepted only in respect of the rates presently effective. See *Mississippi River Fuel Co.* v. *F.P.C.* (1941, 8 Cir.) 121 F. 2d 159. The Act would be imported into the contract in any event, and thus the caveat plus the Act expressly was an acceptance of the contract subject to changes provided by the Act.

Too, pursuant to the Rules of the Commission (see Fn 4, p. 4-5) a statement was filed pursuant to the requirement of Section 154.85. This statement (R. 79-80) shows the vast changes made in the contract. Thus the current filed rates at the time Petitioner filed the application in G-2210 for increase were not those of the contract, but those of the conversion tariff. The majority opinion ignored these orders and their effect. Replacement of Respondent's contract with the conversion tariff is thus in precisely the same situation as that in the Tyler Gas Service Company case, which the majority opinion characterized as an "adversary" proceeding against the Tyler contract (App. 3 Fn 3).

making of 'pragmatic adjustments'."[16] The Act does not specify that a Section 4(d) filing can be had only after a proceeding in which a contract rate is found to be unreasonable or against public interest. Clearly here the Commission has been ordered to substitute the Court's judgment not only as to how the Commission may proceed to find "just and reasonable," but what is "just and reasonable" — a holding squarely in conflict with the well-settled rule that the courts may not so substitute their judgment for the administrative decision, because that determination and decision is given exclusively to the Commission.[17]

The direction in this collateral proceeding to the Commission to recall its order in Docket G-2210 setting a 4(e) hearing[18] is equally in conflict with the well-settled rule that an application for increased rates may not be dismissed without a hearing.[19] This part of the decision requires the Commission to violate the Act, and deprives Petitioner of rights guaranteed by the Act.

Further violence to the Act is illustrated by the attempted distinction of the *Tyler* case (Fn. 3, Op. App. 3) which proceeds upon the assumption that since the *Tyler* rates were *suspended under bond*, protection was adequate to the contract rates. But the Court was without right to assume that all rates other than resale industrial would have a 4(e) suspension, for whether there shall be either suspension or

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[16] *F.P.C. v. Natural Gas Pipe Line Co.* (1942) 315 US 575, 586; *F.P.C. v. Hope Natural Gas Co.* (1943) 320 US 591, 602.

[17] *Colorado Interstate Gas Co. v. F.P.C.* (1945) 324 US 581; *F.P.C. v. Hope Natural Gas Co.* (1944) 320 US 591; *Panhandle Eastern Pipe Line Co. v. F.P.C.* (1945) 324 US 635; *F.P.C. v. Natural Gas Pipeline, supra; Montana-Dakota Utilities Co. v. Northwestern Public Service Co., supra.*

[18] The Commission's order of December 7, 1953, from which Respondent appealed, shows the hearing on the consolidated dockets, including Docket G-2210 (the 4(e) hearing on increase to Respondent) and G-1142 (the 5(a) proceeding involving all of Petitioner's rates) had then proceeded to the point where Petitioner had presented its direct case in support of the filing in Docket G-2210 (App. 8).

[19] *F. P. C. v. Natural Gas Pipeline Company* (1942) 315 US 575, 583; *Atchison, Topeka & Santa Fe v. U. S.* (1932) 284 US 248, 262; *Ohio Bell Telephone Company v. Public Utilities Commission* (1937) 301 US 292; *Morgan v. U.S.* (1936) 298 US 468.

refund requirement is discretionary with the Commission. Under the reasoning of the Court, failure to suspend or require refunds would produce another gap in the Act identical with that resulting here. Furthermore, the distinction impliedly concedes lack of necessity for a contract hearing by the suggestion that refund provisions of 4(e) are adequate protection; but refund is not based on the superseded contract rates, it is the difference, if any, between the proposed new rates and those the Commission ultimately finds to be just and reasonable. The distinction, then, seems to recognize what Petitioner insisted, i.e., that contract rates are nothing more than evidence relevant to Commission determination of the ultimate issue of "just and reasonable," which determination is adequate protection procedurally and substantively to the "contract." That evidence of contract rates for Commissoic consideration in arriving at "just and reasonable" is sufficient guarantee of protection to "contract rights" is conclusively shown by the language of Section 4(e), also ignored by the majority opinion, which provides that after the 4(e) hearing, "the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." This language gives the Commission all the powers it possesses under Section 5(a).[20]

No resale purchaser, such as Respondent, is permitted to file the 4(e) complaint which authorizes the Commission to order a hearing on a 4(d) filing; that is limited to any State, Municipality, or State Commission — — regulatory authorities at the local level.[21] In Section 5(a), however, which provides for a hearing upon the complaint of unreasonableness of an existing filed rate, Congress carefully added to the governmental protectors of the public interest the "gas

[20] *Hope Natural Gas Co. V. Federal Power Commission* (1952, 4 Cir.), 196 F. 2d 803, 805; *Northern Natural Gas Co. v. Federal Power Commission*, 8 Cir., not yet reported, decided August 17, 1954, in cases #14706 and 14733 at page 11 of the opinion.

[21] Of course a municipality may own and operate its own distribution system, but this would merely be incidental to the obvious design of the Section.

distributing company" as one authorized to file such a complaint. This selective handling by Congress demonstrates the impropriety of the decision below, for surely if, as adjudged, a contractee such as Respondent has a "common law" standing superior to "statutory regulation" until the brake of its "common law contract right" is released, the right under Section 4(e) to apply that brake to proposed rates effecting change in contract rates would have been statutorily specified.

No basis exists for the assumption, which the footnote on *Tyler's* case suggests, that Congress intended power under 4(e) to suspend rates other than industrial or to order refunds, should be in lieu of the hearing here ordered. If so, Congress then would have required suspension of rates for resale for industrial use only, and made the suspension of Section 4(e) obligatory, not merely discretionary. Common law contracts for resale for industrial use have equal dignity at the law with domestic resale contracts. If the Court intends a difference, additional insertion of addenda in 4(e) is immediately required. If there be no difference, then the Court's reasoning does not merely emasculate Section 4, it strikes it down; because Section 4(e) then would contain an invalid and unreasonable classification. The Court's reasoning gives no answer for the situation where the Commission elects not to suspend under 4(e).

Apart from judicial review, this Court has made it abundantly clear that the Act is for the Commission to administer, that the courts may not interfere with the Commission's exercise of that power, nor substitute their judgment for that of the Commission.[22] Yet the Court below directs action contrary to the authority of the Act and requires issuance of orders contrary to the plain statutory provisions. This is not judicial review; it is legislative substitution of judicial judgment for administrative judgment.

[22] *F. P. C. v. Hope Natural Gas Company* (1944), 320 U.S. 591, 617; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* (1951), 341 U.S. 246, 251; *Colorado Interstate Gas Co. v. F. P. C.* (1945), 324 U.S. 581, 589.

which this Court has said is exclusively vested in the Commission.

The effect of this decision is to produce multiplied confusion and uncertainty in the areas of applicability of the Act and the Commission's jurisdiction under it as well as to destroy the ability of the natural gas company to meet the duty imposed on it by Section 4. There is no basis for the statement that Petitioner seeks "under the cover of the Act to avoid its contractual duties."[23] Against the preemptive nature of the Act, Petitioner was without power to make a contract contrary to the provisions thereof, nor could it thereby escape performance of those duties which Section 4 obligated it to perform. Petitioner must comply with the Act.

The effect of this decision is to destroy regulation applicable to all alike and require the Commission to regulate separately each individual contract. Thus the dissent of Judge Hastie is sharp and pointed, for without doubt the Commission's order was lawful and proper within the Act; and the Court's requirement of rejection and refund prescribes Commission action contrary to the ambit of the Act.

2. The conclusions of the Court are also in conflict with other Courts of Appeal. The holding that contract provisions and rights are not subject and inferior to the provisions of the Act but are controlling over the regulatory scheme until found to be against the public interest in a proceeding brought for that purpose is clearly inconsistent with the decision of the Fifth Court of Appeals in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1945),

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[23] When this suggestion is considered in the context of the entire opinion and in the light of the plain meaning and intent of the Act it brings to mind the complaint of Judge Holmes:

> "What complications involve us if we try to do justice according to our idea of what is right though not within the framework of the law". (153 F. 2d at page 860.)

162 F. 2d 388, cert. den. 332 US 770.[24] There the Court held that a "favored nation" clause for a lower rate contained in a contract became "inoperative" after passage of the Act; that while Section 4 placed the "burden" on the natural gas company to file a new schedule, Section 5 gave adequate remedy and right to the distribution company, by complaint, to have determined whether a rate was proper under the terms of the Act. No special proceeding against the contract was suggested.

Michigan Consolidated Gas Co. v. *Panhandle Eastern Pipe Line* (1949, 6 Cir.), 173 F. 2d 784, affirming (D.C.E.D. Mich. 1948) 80 F. S. 27, also holds that contract provisions lose their force to the extent they conflict with orders or regulations of the Commission with no suggestion of special proceedings against the contract.

In *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1941, 8 Cir.) 121 F. 2d 159, the filed contract contained an escalation clause for increased rates to be effective after January 1, 1940. The Commission suspended the natural gas company's application for the increased rate and, upon hearing, refused to approve the increased contract rate and continued in effect the pre-escalation contract rate. Mississippi then appealed under Section 19(b) claiming priority and superiority of its contract rate, but the Court held the contract and its rates subject to regulation in the public interest and disposed of it in a 4(e) proceeding without requiring a special proceeding or one under 5(a).

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[24] It is well settled that contracts and rates thereunder are inferior and subject to regulatory statutes, and are invalid and unenforceable to the extent they conflict with the statutory regulation. *Union Dry Goods Co.* v. *Georgia Public Service Co.* (1919) and cases cited, 248 US 372. Where Congress acts the Commerce Clause and preempts the field as in the case of the Interstate Commerce Act (from which the Natural Gas Act was so largely taken) and the Natural Gas Act, private contracts are without force against the statutory scheme. *Armour Packing Co.* v. *United States* (1908) 209 US 56; *New York N H & H Ry. Co.* v. *I.C.C.* (1906) 200 US 361; *New York* v. *United States* (1922) 257 US 591. Rules applicable to the Interstate Commerce Act thus apply to the Natural Gas Act. *Hope Natural Gas Co.* v. *F.P.C.* (1952, 4 Cir.) 196 F. 2d 803, 807; *Pennsylvania Water & Power Co.* v. *Consolidated Gas Electric Light & Power Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 US 906.

The conclusion of the Court below that the Commission should have rejected Petitioner's filing here is clearly inconsistent with its former opinion in *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953) 202 F. 2d 899, and this "intra-Circuit conflict" alone makes this case a proper one for review by this Court. *John Hancock Insurance Co.* v. *Bartles* (1939) 308 US 180, 181; *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 US 507, 508. In *Mississippi's* case the Commission, acting as the Court now orders, rejected and dismissed a filing under Section 4. There the Court of Appeals for the Third Circuit reasoned that the "face" of Section 4 gave the Commission only two alternative choices. To allow the changes to become effective by failure to act; or to enter upon a hearing and suspend for a maximum period of five months. Instead, reasoned the Court, "it purported to follow a third course, rejection without hearing — a course for which it cannot show even color of statutory authority." Statements in the Court's opinion that the *Mississippi* case is distinguished from this case are wholly inaccurate; the situation is precisely the same.[25]

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[25] The various grounds of distinction stated are clearly inaccurate. First, the plain language of Sec. 154.85 of the Commission's Rules is misconstrued. That part italicized by the court is inapplicable to this record. The language which should have been italicized as applicable here provides that the filed contract

> "* * * shall be considered as an executed service agreement to the extent the provisions thereof are not in conflict with other applicable provisions of the rate schedules * * *"

and that of the first proviso:

> "That the natural gas company, concurrent with the filing of the tariff, shall submit, for insertion in each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules * * *"

(See Fn 4, page 5 herein.)

Second, the surprising statement in the course of consideration of Section 154.85 that "There is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate" (Opinion Fn 16, App. 14).

Petitioner vigorously urged that the conversion tariff filed under requirement of Section 154.38(d) (3) (See Fn 4, p. 4-5, supra) which pro-

The record here shows that neither the "until" clause or the last proviso (italicized by the Court) has yet been reached as applicable to Respondent's contract. The required statement (R. 79-80) filed by Petitioner shows the contract rate provisions were not retained, thus could not have been the "existing filed contract" rate.

The Court then examined the dismissal and rejection of *Mississippi's* filing as being comparable to a motion to dismiss for failure to state a claim upon which relief could be granted, or a motion for summary judgment, and concluded the rejection improper because "The statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures." (p. 902) It thereupon set aside the Commission's order on the ground that the dismissal was "wholly beyond the authority of the Com-

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hibited percentage rate clauses and tax adjustment clauses; the statement (R. 79-80) filed pursuant to Section 154.85 showing the vast and substantial changes in the contract; the Commission's order of August 1, 1952 in Docket G-2019 (R. 81) permitting the conversion tariff to be filed and become the effective filed rate schedule; followed by Respondent's failure to take an appeal under Section 19(b) of the Act; all conclusively showed the contract to be replaced and superseded by the conversion tariff and that such was res judicata, citing *Sunshine Anthracite Coal Company* v. *Atkins*, 310 US 381.

Third, the conclusion that "United's filing on June 24, 1953 did attempt to 'effect a change' in an unexpired contract without 'the execution of a form of service agreement contained in the tariff' ", based upon the misconception of Section 154.85 is wholly incorrect. Petitioner's filing of increased rates on June 24, 1953 in Docket G-2210 did not purport to effect a change in a contract, for that contract had not, as such, existed as a "filed contract" since July 3, 1952, the date of filing of the conversion tariff in Docket G-2019 (R. 81) approved by the Commission. Further, Section 154.85 has nothing to do with filing changed rates under Section 4 of the Act. Finally, the execution of a form of service agreement contained in the tariff required in the last proviso of Section 154.85 applies, as expressly stated, only to a change or amendment of that part of the contract which the first part of the Section kept as an executed service agreement. Increased rates did not purport to change or amend that part of the contract left; for such remaining part did not set a rate.

Fourth, and most important of all, the suggestion that there is a difference factually and contract-wise between this and *Mississippi's* case is without basis. The contract-conversion tariff situation between Mississippi River Fuel Corp., and its customer LaClede Gas Co. (202 F. 2d 904) was precisely identical to that here between Petitioner and Respondent. The public files and records of the Commission show: (1) Mississippi filed contract with LaClede dated October 2, 1947, which the Commission numbered as FPC Rate Schedule No. 26; (2) several amendments to this contract were filed prior to July 1, 1949; (3) on July 1, 1949 Mississippi filed its conversion tariff in compliance with Section 154.38(d) (3), also its statement pursuant

mission". This conclusion undoubtedly was right, for the Commission as the regulatory agent is possessed only of those powers expressly granted by the Act, and it possesses no inherent power by virtue of its existence.[26]

State and Federal Courts have also held that rates filed *ex parte* under the provisions of State Public Utility Statutes, taken from the Interstate Commerce Act and containing provisions substantially similar to Sections 4(d) and (e) of the Natural Gas Act, were the only lawful rates which

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to Section 154.85, which superseded the original contract; (4) the Commission permitted the conversion tariff to be filed. Thus, in 1953 when the Court below decided *Mississippi's* case the situation was precisely like that here. There is no doubt that the Court in *Mississippi's* case should judicially have known, and that this Court will take judicial knowledge and notice of these facts irrespective of whether they were a part of the record before that Court or not. See *Interstate Natural Gas Co.* v. *Southern Cal. Gas Co.* (1953, 9 Cir.) 209 F. 2d 380 (Judicial notice "of records and reports of Administrative bodies"—contracts on file and orders in collateral proceedings); *Washington Gas & Light Co.* v. *Baker* (D. C. Cir. 1951) 195 F. 2d 29, 35 (application for rate increase filed since argument of the appeal); *Fletcher* v. *Jones* (1939, D. C. Cir.) 105 F. 2d 58, 61-2, and cases in Fn 14, p. 61, cert. den. 308 US 550 (Records and Reports of Home Owners Loan Board and Home Owners Loan Corporation "even though formal proof thereof" not made below); *Colonial Air Lines Inc.* v. *Janis* (1953 2d Cir.) 202 F. 2d 914, 919, Fn 1 (Press release on action of CAB which court characterized "official action by a federal regulatory agency, not a part of the record below"); *NRLB* v. *Atkins & Co.* (1947) 331 US 398, 406, (Circular or regulations not offered in evidence before the Board); *Savannah River Electric Co.* v. *Federal Power Commission* (1947, 4 Cir.) 164 F. 2d 408, 410 ("Public Records" including letters between executive branches of the Government reports to Congress, Presidential Orders, contracts of Governmental agencies, most occurring after Commission action); *Greeson* v. *Imperial Irrigation District* (1932, 9 Cir.) 59 F. 2d 529, 531 ("Public Facts," "Geographical Positions," "Public Activities within Common Experience"); *Arizona* v. *California* (1895) 283 US 665, 670, (Navigability of a part of the Colorado River); *Tucker* v. *Texas* (1945) 326 US 517, 519.

Finally, the statement that in *Mississippi's* case the Court assumed Commission authority to reject a filing not conforming to its rules and citing Section 154.24. But the assumption was strictly limited to matters of form, i.e., "power to require schedules and supporting data to be organized or broken down into convenient and readily comprehensible form" (p. 902). The Court then tested the assumption as well as the Commision action by comparing it to motions to dismiss for failure to state a claim, or motion for summary judgment, repudiating any power for summary rejection so comparable by rightly concluding that "the statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures" (p. 902).

Thus, Section 154.24 (Op. Fn 17, App. 15) which was in existence and subject to judicial knowledge of the court at the time of such decision was not deemed grounds for affirming rejection nor does the opinion indicate the Commission so urged. Obviously this also applies only to form.

[26] *Electric Power & Light Co.* v. *S.E.C.* (1946) 329 US 90, 106, *Douglas* v. *Noble* (1923) 261 US 165, 167, 169, 170.

might be filed, and to the extent that rate provisions of any existing contract between utility and a consumer provided for a rate different from the rate so filed, such contract was void.[27]

II.

The Court also concluded that all monies collected on the basis of the "erroneous order" were "unlawfully collected" and should be returned to Respondent.[28] In so holding, the Court below is in conflict with the holdings of this Court and of the Fourth and Eighth Circuits, that under the Act the Commission has no power to make reparations, for its power to fix rates admittedly is limited to those "to be hereafter observed and enforced". *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 US 591, 618; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 US 246, 251; *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.), 196 F. 2d 803, 805; *Hope Natural Gas Company* v. *Federal Power Commission* (1943, 4 Cir.), 134 F. 2d 287, 311, reversed on other grounds 320 US 591; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907), 204 US 426, 439; *Northern Natural Gas Co.* v. *F. P. C.* (August 17, 1954, 8 Cir. No. 14706 and 14733), pg. 11, 13 of Opinion not yet reported.

Clearly the Commission has no power under Section 4(e) to order refund of monies collected pursuant to rates for the sale of gas for resale for industrial use only. In so ordering here the Court below goes entirely outside the Act. The rationale of its opinion in *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953), 202 F. 2d 899,

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[27] *North Hempstead* v. *Public Service Corp.* (1921) 231 NY 442, 132 NE 144; *Public Service Commission* v. *Pavilion Natural Gas Company* (1921) 232 NY 143, 133 NE 427; *Kansas City Power & Light Co.* v. *Midland Realty Co.* (1936) 338 Mo. 1141, 93 SW 2d 954, affirmed *Midland Realty Co.* v. *Kansas City Power & Light Co.* 300 US 109; *Suburban Water Co.* v. *Borough of Oakmont* (1920) 268 Pa. 243, 110 A. 778; *Duquesne Light Company* v. *Public Service Commission* (1922) 273 Pa. 287, 117 A. 63; *Leiper* v. *Baltimore & P.R. Co.* (1918) 262 Pa. 328, 105 A. 551; *V & S Bottle Co.* v. *Mountain Gas Co.* (1918) 261 Pa. 523, 104 A. 667, appeal dismissed 251 US 544; *Harrison Electric Co.* v. *Citizens Ice & Storage Co.* (1921) 149 Ark. 502, 232 SW 932; *Colton* v. *Commonwealth Edison Co.* (1953) 349 Ill. App. 490, 111 NE 2d 363, 366.

[28] Second question presented.

was that the Commission's authority and power were limited to provisions of the Act. After discussion and analysis, it concluded that familiar judicial concepts furnished no basis for Commission exercise of analogous authority, because the statute "which defines the powers of the Commission in natural gas matters makes no provision for any such procedures." Yet, here the Court bases its decision on the theory of analogy of judicial concept which is inconsistent with the holding in *Mississippi's* case.

In going outside the bounds of the Act contrary to the rationale of its opinion in *Mississippi's* case, it has reached a result which requires the Commission to exercise a power not defined or granted to it in the Act. Since the Commission is possessed only of power delegated to it by the basic Act and has no power that is inherent by virtue of its existence,[29] it follows that the Court is without authority to so order.[30] Courts may not substitute their judgment and discretion for matters committed to the discretion of the Commission.[31]

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[29] *Douglas* v. *Noble*, 261 US 165, 167, 169, 170; *American P. & L. Co.* v. *SEC*, 329 US 90, 106.

[30] In *Northern Natural Gas Company* v. *FPC* (opinion No. 14706 and 14733, not yet reported) the 8th Circuit speaking of the want of power in a court to require the Commission to order reparations, said:

"It is pointed out that in rate regulation such as is here involved, the Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks power to grant reparation where a rate has proved on application to be confiscatory. The court also is limited strictly to the exercise of judicial power and has no power to fix rates or to accord reparation on account of insufficiency of rates in the past. In the process of rate regulation, therefore, the utility must propose a change in the rates under which it is operating and the Commission allows or disallows the change. It is the allowance or disallowance that is subject to review by the Court. There is no place in the proceeding for either the Commission or the Court to accord reparation."

[31] *Algoma Coal & Coke Co.* v. *US* (D.C. Va. 1935,) 11 F. Supp. 487; *Carlsen* v. *U.S. et al* (D.C.N.Y. 1952) 107 F. Supp. 398; *Merchant Truckmen's Bureau of New York* v. *U. S.* (D.C.N.Y. 1936) 16 F. Supp. 998; *Manhattan Transit Co.* v. *U. S.*, 24 F. Supp. 174; *Board of Railroad Commissioners* v. *Great Northern Railway Co.* (1929) 281 US 412; and cases cited in Fn 17, p. 16.

Conclusion

The questions discussed above are believed to involve questions of Federal law which individually are of such importance to the future administration and application of the Natural Gas Act that they should be settled by this Court. Petitioner submits that the decision below so emasculates and destroys the even and equal application of the Act in accordance with the Congressional intent as to reach a result which it believes to be inconsistent with the decisions of this Court and to call for an exercise of this Court's power of review.

In the recent decision by this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 US 246, 251, this Court said:

> "But the prescription of the statute is a standard for the Commission to apply, and, independently of Commission action, creates no rights which courts may enforce.
>
> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion.
>
> "It can claim no rate as a legal rate that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms. * * * the right to a reasonable rate is the right to the rate which the Commission files or fixes * * *."

It is believed that the Court below has completely disregarded this clear admonition that Congress has entrusted administration to the Commission, and that the courts may not authorize commerce in natural gas at any rate other than the rate made "specific by the Commission", i.e., the filed rate, whether fixed or merely accepted by the Commission, and has substituted its own judgment for that of the

Commission and directed action clearly outside the bounds of the basic Act.

It is accordingly urged that a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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No. .....

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

MOBILE GAS SERVICE CORPORATION,
FEDERAL POWER COMMISSION,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervener.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued May 19, 1954

Before McLAUGHLIN, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed September 7, 1954)

By McLAUGHLIN, *Circuit Judge.*

In this proceeding to review an order of the Federal Power Commission the basic question is whether the Commission is correct in holding that under the Natural Gas Act[1] a natural gas company can in effect wipe out a filed rate contract simply by filing an increased rate schedule. Substantially that is what the Commission considers to have happened to petitioner's contract with intervener.

Mobile Gas Service Corporation, the petitioner, is an Alabama distributor of natural gas. It receives its entire supply of that fuel from the intervener, United Gas Pipe

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[1] 52 Stat. 821-833; 15 U.S.C. Section 717-717w (1952).

Line Company, a Delaware corporation.[2] By a 1936 contract between it and United's predecessor and an agreement entered into in 1941 with United itself certain of Mobile's gas for resale industrially was to be supplied by United for 90% of Mobile's gross resale revenues. The contract provided that the gas was not to be resold industrially for less than 16¢ per MCF (1,000 cubic feet) without United's consent. This agreement as amended by the 1941 contract was to continue in effect until 1962. Both contracts were filed with the Commission and became United's Gas Rate Schedule #20 and Supplement to that Schedule #7.

In 1946 United agreed with Mobile to a proposed arrangement between Mobile and Ideal Cement Company whereby the latter could be supplied with its industrial gas needs by Mobile for 12¢ per MCF for a period of ten years provided total deliveries remained between 100,001 and 400,000 MCF per month. In accordance with this United consented to accept the percentage rate of Mobile's sales to Ideal though this would be less than the minimum of 16¢ per MCF. United also agreed at that time to reduce the price of industrial gas to Mobile from 90% of the latter's gross resale revenues to 80% up to 41,667 MCF per billing month and 90% in excess thereof. Those agreements were filed with the Commission as Supplements #9 and #10 to United's Rate Schedule #20. Mobile then consummated its proposed contract with Ideal Cement Company to supply gas to the latter for ten years at 12¢ per MCF. The Alabama Public Service Commission approved that contract. Not only United but the Commission recognized the contract as late as July, 1952, when the Commission allowed United to substitute in its filed tariff a flat rate of 10.7¢ per MCF in place of the percentage rate Mobile had been paying. As United advised Mobile, this substitution was

[2] Jurisdiction is obtained by reason of Section 19(b) of the Natural Gas Act, 52 Stat. 831; 15 U.S.C. Section 717r(b) (1952).

made under the Commission directive to convert from percentage to fixed sum and was almost identical with the amount the Mobile percentage rate actually figured.[3]

On June 24, 1953, United filed with the Commission proposed increased rates, including a rate of 14.5¢ per MCF for industrial use gas for Mobile. On July 10, 1953, the Commission ordered a hearing on the lawfulness of those rates, suspended them pending the hearing with the exception of the new Mobile rate, and ordered that hearing to be consolidated with an earlier proceeding investigating all of United's rates. The new rate for Mobile being for industrial use was not subject to suspension under Section 4(e) of the Act. As a result it became operative July 25, 1953. Mobile, on July 16, 1953, attempted to intervene in the consolidated proceeding. On August 4, 1953, it filed a petition with the Commission setting up the above situation and asking the Commission to amend its order of July 10 so that United's new filing in so far as it affected the Ideal contract would be rejected and the 14.5¢ rate would not be permitted to take effect. In the alternative it requested a hearing on the lawfulness of the filing of that rate and

---

[3] In Tyler Gas Service Co. v. United Gas Pipe Line Co., D.C. Tex., Dec. 23, 1953, unreported, (on appeal, 5th Cir.), United had agreed to just such an arrangement as Mobile made with Ideal—that is the furnishing of natural gas at a reduced rate. There the period was sixteen years.

In that suit there was a denial of an application for an injunction to prevent United from moving before the Commission for permission to collect its new rate for domestic use gas until the reasonableness of that rate had been finally determined by the Commission. There was a contract involved but it had already been modified in what seems to have been an adversary proceeding. According to the opinion of the district judge the "* * * plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, * * *." The all important question before us of whether there should be a hearing on the reasonableness of an existent unchanged approved contract prior to the acceptance for consideration of the new rate and prior to the determination of the reasonableness of that new rate was not before the court.

It should be emphasized also that the fact that Tyler concerned a rate for sale of gas for domestic use of itself sets that action apart from the issue of this appeal. In Tyler under Section 4(e) the Commission could and did suspend the effective dates of the increased rates for five months after which period it could order any subsequent collections to be held subject to refund in the event the new rates were ultimately found to be unlawful.

asked that if Mobile was obligated to pay United the increased rate, United be directed to hold those payments subject to refund to Mobile in the event the new rate was ultimately determined to be unlawful. At that stage no action had been taken on Mobile's application to intervene and the new rate had been governing since July 25th. As a consequence Mobile amended its petition and urged the Commission that it be made a separate cause. That prayer was granted as was United's later petition to intervene in the new proceeding. On December 7, 1953 the Commission on the pleadings denied the prayers of Mobile's petition and dismissed it. On February 4, 1954, the Commission refused rehearing to Mobile. This petition for review of the Commission's decision followed.

Mobile's main point is that its United contract with respect to Ideal is a valid agreement which cannot be set aside by United's unilateral action of filing an increased rate schedule. It frankly recognizes the Commission's paramount authority and concedes that if after a proper proceeding the Commission found the contract rate to be against the public interest it could modify it or set it aside entirely.

The Commission contends that where a natural gas company files a rate schedule under 4(d) of the Act that rate is to be charged unless suspended initially or disapproved finally by the Commission after investigation and hearing; rates for industrial use not being subject to suspension when filed become effective thirty days thereafter until finally passed upon by the Commission. The latter insists that even where as here the rate conflicts with an admittedly preexisting filed contract the distributor is given no chance to defend its contract, on which it has made approved commitments, before that contract is to all practical purposes abrogated.

It is undisputed that under the ordinary 4(e) proceeding which the Commission has instituted with reference to

the new rate schedule involved the dispositive question before the Commission is whether the increased rates are just and reasonable. 4(e) makes this plain when it says:

> "* * * At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

In other words if in the pending hearing United can show that its new filed rate for Mobile is reasonable that ends the matter and the new rate stands. No consideration will be given to the accepted contract, the circumstances under which it was entered into, the long term commitments sanctioned by the Commission and whether the rate fixed by it is unreasonable and against the public interest under the facts. What petitioner is endeavoring to do is have its contract passed upon in the first instance prior to authorization for filing of United's new rate and the consideration of whether that rate is currently reasonable.

The Commission maintains that 4(d) of the Act upholds its stand. That section provides, as far as we are primarily concerned, that "no change shall be made by any natural-gas company in any such rate * * * or *contract* relating thereto, except after thirty days' notice to the Commission and to the public." (Emphasis supplied). This

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[4] Section 4(d) of the Act reads as follows:

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

means, according to the Commission, that since under 4(e) it does not have the power to suspend an industrial use gas rate, United can fundamentally cancel the Mobile contract despite the fact that as of now Mobile is bound for its duration to Ideal, subject only to the Commission later passing finally upon the rate. And in the Commission thought this can take place without any statutory notice to Mobile or an opportunity for Mobile to be heard regarding its contract rate. The practical result of this is that Mobile in living up to its contract with Ideal is supplying natural gas to that company for 12¢ per MCF and may well be forced to continue to do so until the expiration of its contract in 1956. Meanwhile Mobile must pay United 14.5¢ per MCF for the same gas it delivers to Ideal though its contract with United has never been questioned by the Federal Power Commission or in any way construed to be against the public interest.

The Commission and intervener rely to a large extent upon *Union Dry Goods Co. v. Georgia P.S. Corp.*, 248 U.S. 372 (1919), and *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109 (1937). The first case is quoted by the Commission as holding at page 375: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." The principle stated is of course sound law and is expressly uncontroverted by petitioner. In the Union litigation there had been a hearing before the Georgia Commission on the question of the reasonableness of the contract rates. The Commission found that they were unlawfully discriminatory. Here, as we have seen, Mobile had no opportunity to defend the contract rate prior to the new rate coming into being.

Midland does lend some support to the position of the Commission and the intervener. But there the rates filed by the utility were not opposed and were permitted by the

Missouri Utility Commission without hearing.[5] Far more important than that the decision is based upon a state court interpretation of a state statute. The question litigated and passed upon was whether a Missouri statute as construed by the Missouri Supreme Court violated the federal constitution. That sort of problem is not presented in this action.

Another case involving a state court explanation of a state law is *Wichita R.R.* v. *Public Utility Commission*, 260 U.S. 48 (1922).[6] That came into the federal courts through diversity of citizenship and as far as it goes affords strong help to petitioner. In it the Kansas Commission without any finding of unreasonableness and despite a duly filed contract for the sale of electric power authorized a surcharge. The railroad had appeared in the Commission proceeding and had objected. The matter was removed to the United States District Court which restrained execution of the Commission's order.[7] The Eighth Circuit reversed.[8] The Supreme Court upheld the district court, quoting with approval from the opinion of the Kansas Supreme Court in *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1, 147 Pac. 1130 (1915) where it is stated that:

> "* * * The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed

[5] A very real distinction exists between the position of the realty company in Midland and that of the present petitioner. Hearings were held on similar contracts and the latter found unreasonable prior to the utility company's suit against Midland being disposed of and Midland had not appeared in those hearings. In other words Midland made no attempt to attack the new rate directly before the Commission but contented itself with raising a defense in a collateral proceeding brought by the utility company.

[6] See also Atteboro Steam & Electric Co. v. Narragansett Electric Lighting Co. 295 Fed. 895 (R. I., 1924), construing a similar Rhode Island statute.

[7] Wichita's motion for judgment on the pleadings was granted. There was no reported opinion.

[8] 268 Fed. 37 (8th Cir. 1920).

upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The Kansas procedure as to rates bears great similarity to the Natural Gas Act formula. Under Section 20 of that state's public utility statute[9] a public utility may file higher rates. Section 13 of the law empowers the Commission to set aside rates which after hearing have been found to be unreasonable. It is under the parallel provision in the Natural Gas Act (Section 5(a)), that petitioner contends the Commission should have functioned in passing upon United's attempt to obtain a higher rate for its gas sold to Mobile for the industrial user Ideal. Section 5(a) reads:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

[9] Public Utility Law of Kansas, Session Laws of 1911, c. 238.

Section 5(a) was before the Tenth Circuit in Colorado *Interstate Gas Co.* v. *Federal Power Commission*, 142 F.2d 943, 954 (1944), affd. 324 U.S. 581 (1945). In that case on complaint of the City and County of Denver and the State of Wyoming the Commission held that existing rates and contracts were unreasonable. The gas companies claimed that the finding was not founded on substantial evidence. The Court said:

> "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness. Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F.2d 881. And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431."

The Commission suggests that the Colorado decision is not applicable because the proceedings were under Section 5 but we fail to note any contradiction of the court's statement that filed contract rates and charges can only be set aside on an express finding of unreasonableness which in turn specifically follows the very opinion (Wichita) that the Commission asserts turns on a peculiar Kansas law. Actually the Commission time and again insists that it does not claim that the Congress in the Natural Gas Act intended to set aside contracts completely. It states flatly that the Act shows no such thought. Nevertheless on the theory of

"scheme of regulation" it argues that it be permitted to construe Section 4(d) so that in reality that consequence is obtained. In *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, the Supreme Court made it abundantly clear that such authority "requires clear authorization," which is absent from the Natural Gas Act. In the Niagara Mohawk litigation the query was whether the Federal Water Power Act of 1920 had abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. The Supreme Court interpreting that statute said at p. 251:

> "* * * We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. * * * On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties."

So here, the Natural Gas Act does not expressly permit existing contract rights to be abolished by a mere unilateral filing of new rates. The plan of the Natural Gas Act is likewise one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable.

Beyond question the Commission's action in this instance would result in further impairment of petitioner's common law rights. As the Supreme Court stated in *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907), a case cited by intervener but interpreting the Interstate Commerce Act:

> "* * * a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that

> is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

See *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879); *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, 953 (8th Cir. 1950); 3 Sutherland, Statutes and Statutory Construction (3rd ed. 1943) 164-182.

Nor is a rate contract automatically nullified merely because the return is low. In this instance there seems no doubt but that the Ideal Cement account represented important new business to Mobile and to United and that the long range price concession was made in order to obtain it. Cf. *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U.S. 379 (1923); *Railroad & Light Co.* v. *Court of Industrial Relations*, 13 Kan. 217, 214 Pac. 797 (1923). And the fact that the Commission can change the contract does not render it void for lack of mutuality. *Southern Utilities* v. *Palatka*, 268 U.S. 232 (1925); *Hinkel Dry Goods Co.* v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (10th Cir. 1933).

With reference to the pertinent legislative history regarding such contract as before us, all three of the parties quote the colloquy between Congressman Halleck and Mr. Booth, appearing for the Illinois Public Service Commission on the bill which immediately preceded the Natural Gas Act. The accurate report of this reads:

> "Mr. Halleck. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract *could* be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?
>
> "Mr. Booth. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an

unfair return upon the fair value of its property." (Emphasis supplied).

Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H.R. 4008, at page 43.

The reasonable inference from the above is identical with petitioner's theory, namely, that the Commission has the power to eliminate a private contract; not that the latter is automatically destroyed by the unilateral action of a party thereto.[10]

There is no mention in the debates of Congress that the Act was ever intended to permit a contracting party to eliminate its existing contracts simply by giving thirty days' notice to the public and to the Commission. Instead the Act was stated to contain the "usual provisions * * * such as we find in all regulatory measures enacted by Congress,"[11] and according to the Committee report, there was

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[10] The intervener cities, Armour Packing Co. v. United States, 209 U.S. 56 (1908), for the point that Congress intended the scheme of the Act to replace every other device, including contract provisions. That case was under the Elkins Act amendment to the Interstate Commerce Act. As the opinion itself states that amendment was adopted to make certain that all shippers be given the same treatment with one rate for a similar carriage of freight. The court also made clear that the Interstate Commerce Act contained no provision for the filing of contracts with shippers. The lack of recognition of that type of agreement in the Interstate Commerce Act was for the consideration of Congress stated the Court. Commenting on the omission of the Interstate Commerce Act to provide for private contracts the Court said at page 82: "It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done." As we have seen this possible course outlined by the Supreme Court in Armour has been followed in the later Natural Gas Act.

[11] 81 Cong. Rec. 6722 (1937):

Mr. Lea: * * *

"There are the usual provisions. Without attempting to go into detail, what I call usual provisions are those such as we find in all regulatory measures enacted by the Congress. This bill contains, for instance, administrative provisions; for rules affecting just and reasonable rates; for the power of the Commission to fix maximum or minimum rates or a specific rate after hearing; for the rule against discriminations and preferences as between consumers or localities; for the requirement that the schedules be kept open for public inspection; for the power of the Commission to suspend the rates where deemed unduly high. The bill covers

"nothing novel in its provisions."[12] It should also be noted that there was virtually no opposition to the bill from any source.[13]

The Commission itself in its brief says:

> "The reports of the Federal Trade Commission on the natural-gas industry abound with references and data concerning the contracts of gas companies most of them for long terms. It was at the time of the passage of the Act, and is now, a common and usual practice for such gas companies to contract for all sales or transportation of natural gas. Those companies which sold otherwise were exceptions."

This being so one would think that there would be at least some debate on a provision which provided for the lawful unilateral cancellation of that type of agreement if Congress had that in mind.[14]

The Commission also makes much of the provision in Section 4(e) which prohibits the Commission from suspend-

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the question of accounting, following standard lines; of giving the Commission the power to control the accounts, including the depreciation account; and of requiring the gas companies under the regulation of this bill to conform to those accounting practices.

* * * *

"The bill makes provision for complaints and provides for hearings and has the usual provisions in reference to the production of testimony and rehearings by the Commission on petition, court review of the orders of the Commission, and, a rule that the findings of the Commission, if supported by substantial testimony, are conclusive upon courts in connection with questions that may be taken to courts.

"Those are what might be called the principal provisions of the bill."

[12] H. Rep. No. 709, 75th Cong., 1st Sess., p. 3. See Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581, 601 (1945).

[13] 81 Cong. Rec. 6725 (1937):

"Mr. Mapes: Mr. Chairman, as far as I know, there is no opposition to this bill. I do not know of any member of the House or anyone else who opposes it. It is supported by the public utility commissions of the States and by all public bodies, as far as I know, who have anything to do with or have given any particular attention to the question of the distribution and sale of natural gas to the consuming public. As a matter of fact, my attention has not been called to any opposition to it, even on the part of the gas companies themselves."

[14] The Commission points to certain evidence of the Commission's solicitor on a predecessor bill as demonstrating the intent to make filing procedure controlling irrespective of the contractual situation. There is nothing in that testimony from which it can be fairly concluded that the kind of contract before us was within the contemplation of the witness or his examiners.

ing rates for the sale of natural gas for resale for industrial use. The purpose of this provision, however, as stated by the Congressman who introduced the amendment, was "to prevent suspension in cases of industrial use *where there are short term contracts* * * *;"[15] (Emphasis supplied.) The clear implication is that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates. The implication is equally clear that Congress did not visualize the present circumstances where one of the contracting parties is attempting under the cover of the Act to avoid its contractual duties.

The Commission's order under review refers to Part 154 of the Commission's Regulations under the Act. Those Regulations give no assistance to the Commission's interpretation of Section 4. The very section of the Regulations under which United filed its conversion schedules[16] in May, 1952, reads as follows:

> "Section 154.85 *Status of contracts filed as rate schedules and restated.* Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, *until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in ef-

[15] 81 Cong. Rec. 6727 (1937).

[16] There is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate. The latter as has been mentioned was substantially the same as the old percentage rate and inferentially became a part of the unchanged contract.

fect: *Provided, further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.*" (Emphasis supplied in part.)

United's filing on June 24, 1953 did attempt "to effect a change" in an unexpired contract without "the execution of a form of service agreement contained in the tariff." This case is therefore distinguishable from *Mississippi River Fuel Corp.* v. *Federal Power Com'n*, 202 F. 2d 899 (3rd Cir. 1953), where we held that all the filing requirements had been complied with, and where there was apparently no existing filed contract. Moreover, we assumed for the purposes of that case "that the Commission has the power, implied from its authority to make rules and regulations, to reject a proposed filing which does not conform to such rules and regulations." *Mississippi River Fuel Corp.* v. *Federal Power Com'n, supra* at 901. See 18 CFR Section 154.24.[17]

In view of the above language in the Commission's own Regulations and of the complete absence of suggestion in the statute or in the legislative history that the Act was intended to authorize the abrogation of existing contract rights by means of the unilateral substituted rate procedure, we hold that the Commission erred in not rejecting United's Revised Sheets Nos. 39 and 40 in so far as they affected the Ideal contract. To do otherwise would be an attempt by us to legislate judicially since the construction of 4(d) as contended for by the Commission and the intervener is not warranted by the statutory language. *F.P.C.* v. *Niagara Mohawk Power Corp., supra.* Any changes in 4(d), particularly of the radical nature urged, would be for the consideration of the Congress, not for this court.

[17] "Section 154.24 *Rejection of material submitted for filing.* The Commission reserves the right to reject any material submitted for filing which . . . fails to comply with the requirements set forth in this part [Section 154]."

With this holding it becomes unnecessary for us to consider Mobile's alternative contention that even if the revised schedule be accepted for filing a subsequent separate hearing be held on the lawfulness of the filing at which time the reasonableness of the prior contract rate would be passed upon. Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies collected after the acceptance of such filing be held subject to refund. Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile. *B. & O. R. Co.* v. *United States*, 279 U.S. 781 (1929); Restatement, Restitution, Section 74 (1937); cf. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134 (1919).

Those parts of the Commission's order which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, will be reversed.

HASTIE, *Circuit Judge*, dissenting

The Commission's order of July 10, 1953 was lawful and proper under the terms and scheme of the Natural Gas Act. This court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent.

A true Copy:

Teste:

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 11,280

MOBILE GAS SERVICE CORPORATION,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

Present: McLaughlin, Staley and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that those parts of the order of the Federal Power Commission which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, be, and the same are hereby reversed.

Attest:

Ida O. Cresroff

Clerk

September 7, 1954.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, NELSON LEE SMITH and SEABORN L. DIGBY.

In the Matter of MOBILE GAS SERVICE CORPORATION	DOCKET NO. G-2227

ORDER PERMITTING INTERVENTION, DENYING RELIEF REQUESTED, DISMISSING PETITION, AND TERMINATING PROCEEDINGS

On June 24, 1953, United Gas Pipe Line Company (United) filed First Revised Sheet No. 40 and Second Revised Sheet No. 39 to its FPC Gas Tariff, Original Volume No. 1, in Docket No. G-2210. These revised sheets contained proposed increases in rates and charges to Mobile Gas Service Corporation (Mobile) for resale for industrial use only to the Ideal Cement Company (Ideal). United requested July 15, 1953 as the effective date of the proposed increase. However, by order issued July 10, 1953, the Commission denied the waiver of the thirty-day notice period provided in Section 4(d) of the Natural Gas Act, consolidated the proceeding with Docket Nos. G-1142, G-1508, G-2019, and G-2074, and fixed July 20, 1953 as the date of hearing on the reasonableness of the proposed increased rates.

On August 4, 1953, Mobile filed a petition *In the Matters of United Gas Pipe Line Company*, Docket Nos. G-1142, *et al.*, seeking modification of the July 10, 1953 order. At that date, however, Mobile was not a party to the consolidated proceedings, and on August 7, 1953 Mobile amended its petition for modification to make a separate filing in the proceeding designated as Docket No. G-2227.[1]

[1] All relief requested by Mobile in Docket No. G-2227 is relief which more appropriately should have been sought in the docket in which the complaint arose, Docket No. G-2210. This is, however, not material.

In its petition in Docket No. G-2227, Mobile requested that:

(a) The Commission amend its order of July 10, 1953 in Docket Nos. G-1142, *et al.*, to reject United's filing of its First Revised Sheet No. 40 and Second Revised Sheet No. 39, which relate to the sale to Mobile of natural gas for resale for industrial use only to Ideal.

(b) If rejection be denied, the Commission modify the order of July 10, 1953 to direct a hearing to be held solely concerning the lawfulness of the filing of United's First Revised Sheet No. 40 and Second Revised Sheet No. 39.

(c) The Commission issue an order amending paragraph (D) of its order of July 10, 1953 "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein."

(d) The Commission issue an order directing United that any increased rates collected from Mobile for resale to Ideal be subject to refund after hearing and determination (i) that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 is illegal, or (ii) that such revised sheets are unjust and unreasonable.

Mobile alleges in its petition that, on June 28, 1946, it had entered into an agreement with United by which United agreed to accept 80 per cent of the proceeds of Mobile's resales to Ideal up to 41,667 Mcf per billing month and 90 per cent of the proceeds of all sales in excess of 41,667 Mcf per billing month even though Mobile's resale price should amount to less than 16 cents per Mcf. This agreement was filed with the Commission as Supplement No. 10 to Supplement No. 7 to United's Rate Schedule FPC No. 20. On July 3, 1952, United filed a restatement of its FPC Gas Tariff, Original Volume No. 1, in which, without altering

the contract provisions; United's rate to Mobile for resale to Ideal was stated to be 10.7 cents per Mcf.

In its petition Mobile claims that, in reliance upon this agreement with United, it made a 10-year contract with Ideal to supply that industrial user with natural gas at a rate of 12 cents per Mcf. United has, Mobile alleges, by its filing on June 24, 1953, in which it proposed to increase the rate to Mobile to 14.5 cents per Mcf, unilaterally abrogated the United-Mobile contract. And, Mobile further alleges, its contract with Ideal cannot be altered.

On September 14, 1953, United filed a petition to intervene and answer in Docket No. G-2227. Thereafter, on September 29, 1953, Mobile filed a reply to United's petition to intervene and answer.

Turning first to Mobile's request that United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 be rejected, it is apparent that such relief must be denied. For clearly, Section 4(e) contemplates the filing of rate increases for sales for resale for industrial use only, otherwise the proviso prohibiting the suspension of such rate filings would be purposeless. And since United's filing of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 was made in conformity with the requirements of Section 4 of the Act and Part 154 of the Commission's Regulations thereunder [18 CFR, Part 154], it is, therefore, not subject to rejection. Indeed, a natural-gas company may initiate a rate increase only pursuant to the provisions of Section 4.

In regard to Mobile's request that the "unreasonableness" of United's prior rate to Mobile should be determined in a separate hearing on this issue alone, it should be noted at this juncture that United's entire rate structure subject to the Commission's jurisdiction is presently under investigation and a hearing has been commenced thereon in Docket Nos. G-1142, *et al.* (the consolidated proceedings). No good reason appears why the issues in Docket No. G-2210 should be separated for hearing. In fact, the contrary

appears, for as the Commission stated in its order consolidating Docket No. G-2210 with Docket Nos. G-1142, *et al.*:

> "The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capital, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Docket Nos. G-1142, G-1508, G-2019, and G-2074."

Further practical considerations militate against separation of one of the common issues involved in consolidated Docket Nos. G-1142, *et al.*, for hearing in Docket No. G-2227. For, United has, pursuant to Commission order of July 10, 1953, already presented its direct case in support of its filing in Docket No. G-2210, including the rates to Mobile for resale to Ideal. It is obviously not in the public interest for the Commission to hear the issues pertaining to the rates involved in United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 separately when issues common to all rates filed by United in Docket No. G-2210 impelled the Commission to consolidate the issues in one docket and further to consolidate that docket with others.[2]

As for Mobile's request that paragraph (D) of the order issued July 10, 1953, in Docket Nos. G-1142, *et al.*, be amended "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein," no amendment thereof is necessary. By paragraph (D) of said order the Commission merely refused to waive the 30-day notice period provided in Section 4(d) of the Act.

As clearly appears from paragraph (D) of said order and the full context of the order, in which the Commission found that the filed rates may be unjust, unreasonable, or

[2] By paragraph (D) of its order issued July 10, 1953 in Docket Nos. G-1142, *et al.*, the Commission ordered: "Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953."

otherwise unlawful and ordered a hearing concerning the lawfulness of those filed rates, no approval of the rate was involved. Also, as Section 154.23 of the Commission's Regulations under the Act [18 CFR 154.23] provides:

> "The acceptance for filing of any tariff, contract or part thereof is not to be considered as approval by the Commission."

Mobile also requests in its petition in Docket No. G-2227 that rates collected by United under First Revised Sheet No. 40 and Second Revised Sheet No. 39 filed in Docket No. G-2210 be collected subject to refund. But, clearly, the power to require refunds under Section 4(e) of the Act applies only to rates which are subject to suspension and which have been suspended. An interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates, obviously a course of action which the Commission cannot take.

Upon consideration of all the facts and questions of law presented by Mobile and United in this docket, the Commission further *finds:*

(1) Participation of United in this proceeding may be in the public interest.

(2) It is appropriate and in the public interest that Mobile's petition in Docket No. G-2227 be dismissed and the proceeding terminated.

The Commission *orders:*

(A) United be and the same is hereby permitted to become an intervener in this proceeding, subject to the rules and regulations of the Commission: *Provided, however,* That the participation of United shall be limited to matters affecting asserted rights and interests specifically set forth in the petition for leave to intervene; and *Provided, further,* That the admission of United shall not

construed as recognition by the Commission that it might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The separate requests of Mobile, more specifically set forth in its petition filed on August 4, 1953, as supplemented on August 7, 1953, in this proceeding and as summarized in the third paragraph of the narrative part of this order, be and they are hereby denied.

(D) [sic] The petition of Mobile be and it is hereby dismissed and this proceeding be and it is hereby terminated.

By the Commission.

Leon M. Fuquay

LEON M. FUQUAY,
Secretary.

Adopted: December 2, 1953
Issued: December 7, 1953

Excerpts from Natural Gas Act

[PUBLIC — No. 688 — 75TH CONGRESS]
[CHAPTER 556 — 3D SESSION]
[H. R. 6586]

An Act

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas: [52 Stat. 821 (1938); 15 U. S. C. § 717 (1946)]

* * * * * *

RATES AND CHARGES; SCHEDULES; SUSPENSIONS OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connec-

tion with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may

allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipalty, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by

reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~436~~

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONER

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UNITED GAS PIPE LINE COMPANY,

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MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONER

Respondent's opposition to granting the Petition is grounded on wholly untenable reasons.

1. The Decision of the Fifth Circuit In Tyler Gas Service Company and the City of Tyler v. United Gas Pipe Line Company, Cause No. 15034, Furnishes New and Additional Inter-Circuit Conflict Constituting Appropriate Ground For Review By This Court.

On November 24, 1954, the Fifth Circuit in an opinion by Chief Judge Hutcheson, affirmed the District Court decision in the *Tyler* case (Cf. Petition p. 15-18), which sought to declare contract rates superior to change under Section 4 until abrogated by the Commission under Section 5(a) of the Act. Defendant moved to dismiss, because the suit sought "to enjoin compliance by the Defendant with the provisions of the Natural Gas Act, and more

theory and contention that the contracts relied on over-ride and nullify the duties, powers, obligations and procedures imposed and conferred by the Act on Defendant as a natural gas company under the Act, indeed over-ride the provisions of the Act itself" (Resp. App. 2-a).

Such contract rate superiority is Respondent's position. The gravamen of *Tyler's* case, as Respondent's, was "that unless and until the contracts sued on are set aside for some invalidity, or after a hearing before the Federal Power Commission, the contract rates are found by the Commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with lower* rates" (Resp. App. 5-a).

The District Judge in *Tyler* said, "It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers" (R. 106). The Court of Appeals in affirming said such action would be "in contravention, if not in defiance of the Natural Gas Act and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission" (Resp. App. 8-a). This clashes at all points with the holding below that Respondent's contract is superior to Section 4, so that neither Petitioner nor the Commission can lawfully enforce or comply with Section 4 nor the Commission regulate the contract rates until first it abrogates the contract as against public interest.

Below, Respondent contended that since there was a contract fixing rates, Petitioner's filing of new rates under Section 4(d) was "unilateral" and illegal; and the Court

---

* The writer is advised of correction in the opinion so that the word "lower" is corrected to read "higher"; and as corrected reading: "and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with higher rates."

agreed, holding the Commission without power to receive the filing which it further held void. But the Fifth Circuit, rejecting the identical contention made by Tyler, expressly affirmed the District Court holding that such filing under Section 4(d) could not be "unilateral" because "United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective * * * this would be not contrary but pursuant to the statutory scheme" (Resp. App. 9-a). That the Fifth Circuit viewed Sections 4(d) and (e) as expressly providing for change of contract rates by the natural gas company clearly appears from the further holding that the Trial Court "correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the Court could not do" (Resp. App. 9-a).

Tyler is squarely in conflict with the decision here. Such conflict furnishes appropriate reason for review by this Court to settle the broad and highly important questions of interpretation of the principal provisions of Section 4 of the Act.

But Respondent (p. 11) devises the baseless claim that Tyler is inapposite because arising as a "collateral" proceeding. The short answer is that if, as held below, Petitioner's filing under Section 4(d) was void and the Commission without power to receive or permit such filing, it could be collaterally attacked anywhere for lack of jurisdiction and voidness under the classic bases permitting collateral attack.

The concluding paragraph from *Tyler* quoted at page 12 of the Brief in Opposition must be read with the paragraph immediately preceding it, which then clearly shows that all the Court thereby intended was that no conflict existed with the decision here on the procedural question that the

Commission was the correct forum for determination of the rights asserted. On the primary substantive questions, as shown above, the Fifth Circuit was at categorical pains to frame the conflict it drew respecting the effect, rights, and duties of Section 4 upon private contract rates.

2. Section 5(a) Does Not Support Respondent's Contentions.

Section 5(a), when read in connection with Section 4(d), which is its proper context, clearly shows that Congress by the Act provided that contracts setting rates should always be subject to change at the hands of the natural gas company under Section 4(d), and subject to be lowered by the Commission under Section 5(a). This merely preserves the balance of the regulatory scheme comprehensively provided for by said sections.

Contracts and contract rates by Section 4 and 5 of the Act are treated precisely like rates arising in any other manner. Section 5(a) contains no language which either expressly requires or furnishes color of authority for the notion that a 5(a) proceeding is prerequisite where a *contract* exists before the regulation specified by Section 4 is applicable.

3. Respondent's Attempted Escape From Section 4 Ineffective.

Respondent argues (p. 5-6) that Section 4(d) creates no "obligation" on Petitioner to file change in rates. The courts have held to the contrary (See Petition, p. 11, Fn. 11, p. 11) Respondent does not meet or mention these or any other authorities cited in the Petition.

Respondent principally relies on *Wichita R. R.* v. *Public Utilities Commission* (1922) 260 U.S. 48. That case involved a Kansas statute. This Court held that Section 13 of that statute fixed the *only* way in which a filed and effective rate could be changed, set aside, fixed, determined,

or substituted. Section 13 authorized the Commission "either upon complaint or upon its own initiative" to investigate and have "a full hearing," and "if then the Commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory, or unduly preferential," it should "fix and order substituted therefor" just and reasonable rates. The utility claimed Section 20 gave it power comparable to that conferred by Section 4(d) of the Natural Gas Act. But this Court held that Section 20 gave no power to change or affect rates. It thus appears that the Kansas statute was in no manner comparable to the Natural Gas Act; nor did it contain any provisions comparable to Section 4 which expressly authorizes rate changes. In addition Section 13 authorized the Kansas Commission to fix and order rates "substituted" for filed and pending rates. Section 5(a) gives the Commission no such power. The Commission may lower, but not raise, rates; and if the adjudged just and reasonable rates be higher than the filed rates, such adjudged rates under Section 5(a) cannot become effective until the Natural Gas Company files pursuant to Section 4(d).

This Court construed Section 13 as rendering indispensable the finding of unreasonableness; but the Supreme Court of Kansas in the later case of *Consolidated Flour Mills* v. *Kansas Gas & Electric Co.* 119 Kan. 47, 237 Pac. 1037, held that Section 13 did not require the recital of the finding which this Court deemed necessary in *Wichita's* case.

This case is rather ruled by *Midland Realty Co.* v. *Kansas City Power & Light Co.* (1937) 300 U.S. 109, involving a statute almost identical with the Act (See Pet. p. 23-4, FN 27).

The analogy sought for *Federal Power Commission* v. *Niagara Mohawk Power Corp.* (1954) 347 U.S. 239, is artificial and inapposite. That case involved conflict between rights claimed under license from the Federal Power Com-

mission with rights claimed under conveyances and title held under the State. This Court held that "Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that act." Footnote 18 (p. 413) shows that the Senate Committee reported the Bill so framed as to secure and preserve the very rights claimed to be destroyed by the Federal enactment. Here Congressional intent is equally plain that the Act shall be superior to any and all rates reserved in contracts, and that no rate can be fixed, changed, filed, or charged except one filed by the natural gas company under Section 4, or found by the Commission in a 5(a) proceeding.

Respondent misconceives *Armour Packing Co.* v. *United States* (1907) 209 U.S. 56. Both the Interstate Commerce and Elkins Acts required rates to be filed with the Interstate Commerce Commission, but did not provide that contracts stipulating rates could be filed as rate schedules. This Court held such filed rates to be the only legal rates, superior to contract rates, further stating that whether such contracts might be filed and thereafter control was a matter for Congress. When Congress passed the Natural Gas Act, it did permit by Section 4(c) contracts affecting rates to be filed as rate schedules, but deliberately emasculated any possibility contracts might rise superior to the even uniform scheme of regulation ordered by providing in Sections 4(d) and (e) and Section 5(a) that such contract rates were at all times subject to change either up or down by the natural gas company under Section 4(d) and the Commission, under Sections 4(e) and 5(a). Thus Congress prohibited controlling effect to contracts. *Armour* constitutes strong and indisputable authority for Petitioner's position.

4. The Cases Cited Under Part III of the Brief In Opposition Do Not Support Respondent's Claims Thereabout.

On Page 9-10 of the Brief in Opposition, Respondent cites cases asserted to support the unnatural construction of the Act resulting from the opinion of the Court below.

The *Wichita* case has been demonstrated as inapposite (see p. 4-5 herein).

Hinkle Dry Goods Co. v. *Wichison Industrial Gas Co.* (1933, 10 Cir.) 64 F. 2d 881; *Kaul* v. *American Independent Telephone Co.* (1915) 95 Kan. 1, 147 Pac. 1130; and *Railroad* v. *Court of Industrial Relations* (1923) 113 Kan. 217, 214 Pac. 797, are all cases arising under the same Kansas statute involved in *Wichita*, and are subject to the same distinction. The Natural Gas Act does not condition action or power of the natural gas company or the Commission under Section 4 upon such an express finding.

Attleboro Steam & Electric Co. v. *Narragansett Electric Lighting Co.* (1924, D.C. R.I.) 295 F. 895, is of a class with *Wichita*. While Section 48 of the Rhode Island statute contained language similar to Section 4(d) of the Natural Gas Act, the Court there followed the Supreme Court of Rhode Island in *Rivelli* v. *Providence Gas Co.* (1921) 44 R.I. 76, 115 Atl. 461, in holding that Section 21 deprived the Commission of Rhode Island of authority to accept or fix rates except after hearing and investigation in which it should find that the existing rates are "unjust, unreasonable; insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of the provision of said Public Utilities Act." The District Court held that statute was not distinguishable from that before this Court in *Wichita's* case, and that therefore the ruling would be the same (p. 904). Manifestly that does not touch the situation here.

Arkansas Natural Gas Co. v. *Railroad Commission* (1923) 261 U.S. 379, furnishes no assistance to Respondent, for there the Arkansas statute expressly provided that the

Railroad Commission "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities, or distributing companies, and such contracts shall not be affected by this Act or the Act of which this is an amendment." The Natural Gas Act contains no such provision.

Southern Utilities Co. v. *Palatka* (1925) 268 U.S. 232, has no connection with the issues here. *Palatka* did not involve a regulatory statute or one claimed to control contract rates. The city granted a franchise to the utility, specifying rates. The utility announced it would increase rates. The city sued to enjoin the increase over franchise rates; the defense, that franchise rates were so low as to deprive the utility of property without due process, was overruled, the utility refused further to plead; injunction issued as prayed for. The Supreme Court of Florida affirmed.

Colorado Interstate Gas Co. v. *Federal Power Commission* (1944, 10 Cir.) 142 F. 2d 943 (affirmed 324 U.S. 581), was a 5(a) proceeding instituted by the Commission and certain municipal and state regulatory bodies to determine whether filed rates were just and reasonable. There was not involved, as here, the question whether a Section 4 filing superseded a contract rate. See that portion under the heading "Abrogation of prices fixed by contract prior to effective date of the Act" (p. 953), in which the Court held that exercise of regulatory power under the Commerce clause could not be subordinated to arrangements previously effected because entered into "necessarily" with "knowledge" of the paramount authority of regulation.

Finally, Respondent quotes out of context two sentences from an order of the Commission dated December 20, 1948, issued in Docket R-107, overruling motions for rehearing of certain parties therein. The full paragraph reads:

> "As stated in Order No. 144, Section 154.85 of the newly amended regulations expresses the Commis-

> sion's intention to permit contracts now on file as effective rate schedules to continue in effect as executed service agreements until they expire or are superseded.' The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only."

The next sentence in the following paragraph, not quoted by Respondent, gives point to the entire matter:

> "The right of a natural-gas company as given by the Natural Gas Act, to make changes in filed rate schedules, tariffs and *contracts*, is preserved, as it must be." (Italics supplied.)

5. The Opinion Below Shows Petitioner's Contention of the Holding Respecting Refunds To Be Correct.

Respondent does not correctly read the opinion below. One of its contentions was that the Commission, having accepted Petitioner's filing under Section 4(d), should have ordered under Section 4(e) that all monies collected pursuant thereto should be held subject to refund. The contention had nothing whatever to do with refunds in the contingency held by the Court, i.e., an illegal filing which the Commission should have refused. The sentence of the opinion below which appears immediately prior to that part quoted on page 13 of the Brief in Opposition makes this abundantly clear:

> "Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies *collected after the acceptance of such filing* be held subject to refund." (Italics supplied.)

The holding Respondent quotes (p. 13) expressly orders a refund of the monies collected. This, the Petition demonstrates, the Court is without power to do, as is the Commission.

CONCLUSION

For reasons set forth in the Petition, it is urged that a writ of certiorari to review the judgment of the Court below should be granted and that these important questions of Federal law which should be but have not been settled by this Court should be reviewed and determined.

Respectfully submitted,

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December, 1954

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,

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MOBILE GAS SERVICE CORPORATION, AND FEDERAL POWER COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION[1]
AND FEDERAL POWER COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER UNITED GAS PIPE LINE COMPANY

Opinions Below

The opinion and order of the Federal Power Commission, unreported, appears at R. 1. The several opinions of the Judges of the Court of Appeals for the Third Circuit (R. 139) are reported at 215 F. 2d 883.

Jurisdiction

The judgment of the Court of Appeals was entered on September 7, 1954 (R. 155). No petition for rehearing was

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[1] This is a companion case to Federal Power Commission v. Mobile Gas Service Corporation, No. 31, this Term, pending before this Court on writ of certiorari.

filed. That Court reversed a judgment and order of the Commission[2] entered in Docket G-2225 on December 7, 1953 (R. 1), and directed specific action to be taken by the Commission as sought by Mobile. The petition for writ of certiorari was filed on November 5, 1954, and was granted on February 28, 1955 (R. 157). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

Questions Presented

1. Whether Congress, in enacting pursuant to the Commerce Clause the complete and exclusive scheme of regulation of the Natural Gas Act, intended and provided that a private contract fixing rates subject to the jurisdiction of the Federal Power Commission and filed with said Commission as a rate schedule should render inoperative and unenforceable the filed rate provisions of Section 4 of said Act so that a natural gas company cannot make or file with the Commission the change in rates contemplated and required by Section 4(d), and so that the Commission cannot permit or accept, but must reject the filing of change in rates by the natural gas company until first such private contract is set aside as against the public interest in a proceeding brought for that purpose.

2. Whether Congress in the Natural Gas Act has empowered the Federal Power Commission by its own order, or authorized the courts to direct the Commission by order, to require refund of monies collected from a change in rates for the sale of natural gas for resale for industrial use only filed by the natural gas company pursuant to Section 4(d) of the Act, but not subject to suspension under Section 4(e) of said Act.

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[2] For clarity and convenience the Respondent Federal Power Commission will be referred to herein as "The Commission"; Respondent Mobile Gas Service Company will be referred to as "Mobile"; and Petitioner United Gas Pipe Line Company will be referred to as "United".

Statute Involved

The pertinent provisions of the Natural Gas Act (Act of June 1, 1938, Ch. 556, 52 Stat. 821, as amended, 15 U.S.C. 717, et seq.) are set forth in the appendix filed herewith (p. 1-8).

Statement

On January 1, 1936, before passage of the Natural Gas Act[3], Mobile and United's predecessor contracted for sale by United and purchase by Mobile of natural gas at city gate delivery for resale by Mobile to domestic and industrial users (R. 81-6). All obligations of the contract were made expressly subject to valid orders of all governmental bodies, state and federal, having lawful jurisdiction (R. 24).

Pursuant to Section 4(c) of the Act this contract was filed as a rate schedule with the Commission on August 22, 1938, being styled "Rate Schedule F. P. C. No. 20" (R. 9, 24). Supplement No. 7, dated October 17, 1941, was filed with the Commission November 10, 1941, retroactively effective July 1, 1941 (R. 86, 55). Article VI thereof added sub-division (C) "Special Industrial Gas" providing for sale through separate facilities of natural gas for resale for industrial use only at a price of ninety per cent (90%) "of the proceeds received or receivable by Buyer * * *," provided such 90% should never be less than sixteen cents (16c) per thousand cubic feet except upon United's consent in writing (R. 86). The contract term was extended to July 25, 1962.

The Commission's order permitting Supplement 7 to be filed contained a caveat that such action was not to be construed as constituting Commission approval of any provision, term, or condition contained therein (R. 56)[4]. Thus

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[3] Hereafter referred to as "Act".

[4] Cf. Hope Natural Gas Co. v. F. P. C. (1952, 4 Cir.) 196 F. 2d 803, 806.

in 1941 the Commission notified Mobile and United that it did not approve a contractual provision such as Mobile sought to enforce by the contract.

Supplement No. 10 to Supplement No. 7, the contract amendment involved here, dated June 28, 1946, provided for additional delivery under the special industrial gas clause of sub-division (C) above, in Supplement No. 7, for resale for industrial purposes only to Mobile's customer Ideal Cement Company (R. 90). It requested United's consent to reduce the price from ninety per cent (90%) to eighty per cent (80%) of the proceeds received by Mobile. It provided in a tax adjustment clause for reimbursement to United of any additional taxes which might be imposed as therein set out. United conditioned its consent:

> "Subject to our obtaining the approval of the Federal Power Commission, the foregoing is agreed to and accepted this 30th day of July, 1946" (R. 95).

Commission consent, save as to the money rate, was denied by an enlarged caveat in its order of September 23, 1946, permitting the filing, as follows:

> "(C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided for in the above designated schedule, *nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate*" (R. 57)[5].

Supplement No. 9 dated July 30, 1946 (R. 88-90) was permitted to become effective as of January 1, 1947 (R. 57-8) with a caveat similar to that just above. This amended the provisions of Supplement No. 7 relative to industrial

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[5] All emphasis or italics in this brief supplied by the writer unless otherwise shown.

gas and added a ratable provision for priority of deliveries under specified conditions of shortage.

Thus, the Commission permitted Supplement No. 10 to Supplement No. 7, involved here, to be effective only as a current rate filing under the Act, subject to changes or modifications in said rate under the scheme of the Act, free from "any claimed contractual rate or obligation" for a firm rate not subject to change (as Mobile contends). Such was also the law.

Commission approval, the pre-condition to United being contractually bound in said Supplement No. 10, was denied by the caveat in the order; neither United nor Mobile objected; neither appealed to the courts. Thereby the claimed contractual provision for firm rates for a definite period became inoperative.

Thereafter, on October 30, 1948, the Commission promulgated Order 144 amending its general rules and regulations. This required all rates to be stated in dollars and cents, and prohibited percentage and tax adjustment clauses, which were the heart of Supplement 7 and supplement 10 to Supplement 7.[6]

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[6] Under heading "Restatement of Schedules Filed Prior to December 1, 1948" (thus applicable to the original contract and Supplement 7 and Supplement 10 to Supplement 7), § 154.81 made the new rules expressly applicable to all "effective schedules of rates * * * and contracts for the transportation or sale of natural gas subject to the jurisdiction of the Commission filed prior to December 1, 1948" not prepared in accordance with §§ 154.31 through 154.41. § 154.82 provided:

> "REQUIREMENT FOR RESTATEMENT. All effective schedules of rates * * * and contracts not prepared in accordance with §§ 154.31 through 154.41 shall be restated and filed as parts of the tariff in accordance with said sections on or before the date specified in § 154.83, and duly posted at the time of filing; Provided, however, that price provisions which cannot be restated in cents or in dollars and cents per unit as required by § 154.38(d) without effecting a change in rates or charges may be retained in effect without change. Provided, further, that when necessary, pending completion of restatement within the time provided for by Section 154.83 schedules may be filed in accordance with this part as in effect prior to December 1, 1948."

The required restatement pursuant to Section 154.38(d)(3) provided:

> "No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which

Statement pursuant to Section 154.85 required by Order 144 was filed with the Commission (R. 58-9) showing the vast changes these rules wrought in Mobile's contract, irrespective of the caveat of the order permitting the contract and amendments to be filed. The Court below erroneously failed to recognize such changes. No part of Supplement No. 10 to Supplement No. 7 could be or was retained, indeed, none of the supplements to Supplement No. 7 were retained. Examination of Supplement No. 10 to Supplement No. 7 (R. 90-95) demonstrates it was totally within the prohibitions of Order No. 144. (See Footnote 6, p. 5 herein). The conversion tariff and statement were approved and permitted to be filed (R. 60-4) and so were adjudged correct. The cancellations wrought by the Commission's rules were found to be supported by "good cause" and expressly approved. (Finding 2, R. 63; Order (C) R. 64 at

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in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural gas company may state in the service agreement or in the rate schedules filed pursuant to § 154.52 that it is or will be its privilege under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge; Provided further, that no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and the regulations in this part."

Section 154.85 provided:

"STATUS OF CONTRACTS FILED AS RATE SCHEDULES AND RESTATED. Each contract which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff. Provided, however, That the natural gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: Provided further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

Statement relating to Mobile's contract made pursuant to Section 154.85 was filed as required (R. 58-9), and was permitted to become effective as correct (R. 60-64).

Docket G-2019, R. 60-64.) Thus the contract (Supplement 10 to Supplement 7) which the Court below ordered the Commission to honor has not been effective since July 31, 1952, when the Commission in Docket G-2019 ordered the conversion tariff, successor to the contract, to be filed (R. 60). Mobile did not appeal under Section 19(b) of the Act from this change in its contract and thus it is bound. *Sunshine Anthracite Coal Company* v. *Atkins* (1940) 310 U.S. 381; *Tyler Gas Service Company v. United Gas Pipe Line Company*, (D.C.E.D. Tex. 1953) unreported (R. 75-6), affirmed (1954, 5 Cir.) 217 F. 2d 73.

Proceedings Before The Commission

On June 24, 1953 (R. 66) United, pursuant to Section 4(d) of the Act, filed at Docket G-2210 an application for increased rates, including rates for gas sold to Mobile for resale to Ideal for industrial use only. By order issued July 10th, 1953 (R. 66) the Commission ordered that such rates applicable to Mobile "are subject to investigation in these proceedings and such revision as may be appropriate after hearing, but are not subject to suspension," provided for a full hearing pursuant to Section 4(e) to begin July 20, 1953, consolidated Docket G-2210 with several pending proceedings, including Docket G-1142 (a Section 5(a) investigation of all of United's rates instituted in 1948, R. 65), and permitted such increased rates to become effective on July 25, 1953.

On July 16, 1953, Mobile moved to intervene in the consolidated docket, including Dockets G-2210 and G-1142 (R. 70). On August 14, 1953 (R. 72) the Commission permitted Mobile to intervene in Docket G-2210.

On August 4, 1953, Mobile filed in the consolidated dockets G-2210 and G-1142, et al, a petition to set aside or modify the order of July 10, 1953, issued in Docket G-2210 (R. 21). On August 7, 1953 (R. 19) Mobile filed, in the consolidated

dockets a motion to substitute a first page in its petition attacking the order issued in Docket G-2210, to remove the consolidated docket numbers, and to re-file the same as an independent proceeding with an independent number. This motion was granted and the petition docketed at G-2227 (R. 7-18). By this petition Mobile collaterally attacked the order of July 10, 1953, issued in Docket G-2210 and in the absence of all parties to the consolidated dockets, including Dockets G-2210 and G-1142, sought the Commission to set aside, annul, modify, or amend said order in the following particulars:

(1) To annul and set aside that part permitting the filing of the First Revised Sheet 40 and Second Revised Sheet 39 covering sale for resale for industrial purposes only to Mobile for its resale to Ideal Cement Co.; and substitute a rejection because Mobile, having a contract, had not consented (R. 8, 11-12, 17, 2);

(2) To cancel, annul and set aside that part consolidating Docket G-2210 with other consolidated dockets and setting hearing for July 20, 1953; and substitute an order separating and severing Docket G-2210 and ordering a hearing solely on Revised Sheets 39 and 40 applicable only to Mobile (R. 8, 17, 2);

(3) To annul, cancel and set aside paragraph (D); and substitute therefor a paragraph expressly denying and refusing to permit Revised Sheets 39 and 40 to become effective on July 15, 1954 (R. 8, 13-16, 17-18, 2); and

(4) To insert a new decree directing United to refund to Mobile the difference, if any, between the claimed contract rates and the rates finally allowed in Docket G-2210 (R. 8, 16-17, 18, 2).

United filed a petition to intervene and an answer (R. 22-31) raising contentions advanced below and here. Mobile filed a reply (R. 31-38).

The Commission, after granting United's right to intervene, correctly refused this relief upon the following grounds (R. 1-6):

(1) Rejection was denied because filing was pursuant to and in conformity with, Section 4 of the Act, the only section by which a rate increase could be initiated, and which also prohibited suspension of industrial resale rates (R. 3);

(2) No good cause for separate hearing shown while the contrary appeared, particularly due to Docket G-1142, a 5(a) proceeding investigating all rates of United, the Commission's discretion and experience being that such consolidation and joint hearing was more reasonably calculated to permit full and proper consideration, and that United had already offered its direct case (R. 3-4);

(3) Refusal to permit revised rates to become effective would be improper; the Commission had clearly reserved both its right and intent to examine into reasonableness and propriety of the proposed rates; called attention to the caveat of Section 154.23 of its rules (generally similar to the caveat in the orders quoted above) (R. 4-5); and

(4) Denied insertion of provisions for refund because Section 4(e) permitted refunds only of suspendible rates, whereas these were non-suspendible industrial rates (R. 5).

Mobile's motion for rehearing (R. 38) reasserting grounds (1), (2), and (4) (p. 8 supra), was denied by order dated February 4, 1954 (R. 46). Mobile filed a petition to review pursuant to Section 19(b) of the Act in the United States Court of Appeals for the Third Circuit.

The Decision Of The Court Of Appeals

The Court of Appeals permitted United to intervene (R. 110). The Commission appeared in defense of its

order. The Court of Appeals in an opinion written by Judge McLaughlin and concurred in by Judge Staley, with Judge Hastie dissenting, set aside the Commission's order which rejected Mobile's petition in Docket G-2227 and directed the Commission to amend its order of July 10, 1953, in Docket G-2210 to reject the filing of the revised sheets insofar as they affected the Ideal Cement Company contract; further directed the Commission to amend paragraph (D) thereof so as to deny permission for the revised schedule to take effect.[7] The Court held that the Commission should have rejected the filing until it had first determined the reasonableness or unreasonableness of the "existing"[8] contract rate, and that all monies collected on the basis of the "void" order were unlawfully collected and should be returned to Respondent (R. 139).

The dissent of Judge Hastie was:

> "The Commission's order of July 10, 1953 was lawful and proper under the terms and scheme of the Natural Gas Act. This court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent" (R. 155).

The substance of Judge McLaughlin's opinion is as follows: The question is stated to be whether a natural gas company can wipe out a filed rate contract by filing an increased rate schedule.

After stating the history of the contractual arrangement, he apparently treated the conversion tariff as affecting no change and sought to distinguish the opinion of the District Court in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (D.C.E.D. Tex., 1953, R. 75-6), (affirmed

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[7] Mobile in its petition for rehearing (R. 38) did not specify as error as required by Sec. 19(b) of the Act the position originally taken on paragraph (D) of the order (R. 2, 8, 13-16, 17-18). Thus the Court was without jurisdiction to make this holding and order. *Federal Power Commission* v. *Colorado Interstate Gas Co.* (1955) 348 U.S. 492.

[8] The contract rate had not existed since the Commission ordered the conversion tariff filed on July 31, 1952 (R. 60). See p. 6-7 herein.

1954, 5 Cir. 217 F. 2d 73), on the ground that the conversion tariff filing in *Tyler* was an adversary proceeding, (in fact, it was the same tariff with filing accomplished by the same order in Docket G-2019 (R.60)) and also reasoned that the *Tyler* case rule was different because involving rates subject to suspension. The implication was that suspension was equivalent to a proceeding to abrogate the contract (R. 141, FN 3).

The opinion reasoned that the dispositive issue in a proceeding under Section 4(e) was the reasonableness of the proposed rate which would stand upon an affirmative answer, so that no consideration would thus be given the "accepted" contract or the circumstances under which it was entered into, or the "long term commitments sanctioned by the Commission", (thus ignoring the express refusal of the caveat to approve or sanction the contract) and whether the rate fixed by the contract was unreasonable and against the public interest under the facts. The result of the application of Section 4(e), the opinion stated, particularly in the absence of the power to suspend an industrial rate, would leave Mobile bound to Ideal while paying the increased rate to United, though the United-Mobile contract had not been construed in any way to be against public interest.

Coming to the Act, he held that it did not expressly permit abolition of contract rights "by a mere unilateral filing of new rates." To permit that without first finding the contract and its rates unreasonable would not result in reasonable regulation, which the Act contemplated, and would impair common law contract rights.

He thought the contract rate would not be automatically nullified because of a low return, but consideration should be given to the fact that the Ideal Cement account represented important new business both to Mobile and to United. The opinion then turned to the legislative hearings and drew from them a "reasonable inference" that Congress

intended the Commission to have power to eliminate a private contract as result of a hearing and finding that the same was against the public interest, but did not intend that the natural gas company could destroy such contract by a unilateral action. Support in this conclusion was sought by finding that the hearings also supported the implication that Congress intended non-suspendibility of industrial rates to apply only to short term contracts, and that Congress did not visualize that one contracting party under cover of the Act would attempt to avoid its contractual duties. (Thus the opinion apparently implies a hiatus in the Act as to long term industrial rate contracts, without defining short term or long term.)

The Court then sought to distinguish its holding in *Mississippi River Fuel Corporation* v. *Federal Power Commission* (1953, 3 Cir.) 202 F. 2d 899, (petition for cert. dismissed, 345 U.S. 988) and advanced to the conclusion,

> "Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned * * *" (R. 154-5).

It thereupon directed the Commission to amend its order of July 10, 1953; and therein "to reject the filing of the Revised Sheets insofar as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph (D) of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, * * *" (R. 155).[9] Judge Hastie dissented, as noted above.[10]

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[9] See Footnote 7, p. 10 herein.

[10] After filing of the petition herein, Mobile and United changed the industrial resale disposition so that, subject to approval of the Commission, United as assignee of nine industrial contracts of Mobile, including Ideal

Summary Of Argument

I.

A. The clear language of the Act evidences that private contracts are intended to be unenforceable and inferior to the paramount rate regulatory provisions therein. Congress intended to occupy fully the "gap" between production and distribution of natural gas to subserve the public interest identified in Section 1(a).

Sections 4(a) and (b) declare the public policy that "all rates and charges * * * shall be just and reasonable," prohibit all other rates, and prohibit preferences or advantages, or unreasonable differences in rates.

Only the natural gas company is mandatorily required to charge and propose, pursuant to Section 4, just and reasonable rates. This is balanced by the complementary provisions of Section 5(a) requiring a hearing upon complaint by specified parties against a filed and currently applicable rate. The Commission is fully armed if it orders hearing under Section 4(e) with the same powers it can

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Cement Company, would make direct industrial deliveries, and Mobile would receive 2¢ per MCF for transporting the gas. On April 15, 1955, the Commission issued its order approving such rearrangement and making it effective from and after April 15, 1955. This leaves unaffected the questions presented in this case, whether United's contract with Mobile rendered Section 4 of the Act inoperative, deprived United of right and authority to file pursuant to Section 4 of the Act increased rates on June 24, 1953 (R. 66), and rendered such filing void with consequent lack of the Commission's power to receive such filing (Question 1). Also, whether such increase in rates of 3.5¢ per MCF which by said order (R. 66) became the filed and only legal rates and were collected from July 25, 1953 to April 15, 1955, can be ordered refunded as illegally collected (Question 2). If Question 1 be answered favorably to United, such would automatically result in reversal of the Court below on Question 2. If Question 1 be answered adversely to United, Question 2 remains for decision whether the Court below could so order refund of such increases in industrial resale rates not subject to suspension under Section 4(e) which section limits the power of refund to suspendible rates filed pursuant to Section 4(d). Thus the change does not alter the questions for decision or the necessity for authoritative interposition of this Court.

exercise under 5(a). Thus Congress proposed a comprehensive scheme of rate initiation and rate regulation applicable to all alike pursuant to a design and scheme wholly exclusive and inclusive. The intention apparent from the face of the Act is that Congress intended the statutory regulation to replace every other device including contract provisions about the subject matter of the regulation.

The Act was taken in direct lineage from the Interstate Commerce Act, and thus the philosophy of *Armour Packing Company* v. *United States*, (1908) 209 U.S. 56, and *Producers Transportation Company* v. *Railroad Commission of California*, (1919) 251 U.S. 228, are applicable and demonstrate the statutory superiority to contract which, by the necessities of the public policy declared, must in all things be subject to the Act.

B. The rationale of cases dealing with the general principle of relative weight of private contract against governmental or public regulation reinforces the manifest purpose of the Act. Thus the decision in *Union Dry Goods Company* v. *Georgia Public Service Commission*, (1919) 248 U.S. 372 is controlling. There this Court collated cases dealing with private contracts versus varying types of governmental activity and regulation, concluding, as the collated cases, that private contracts become unenforceable and inoperative in the face of governmental regulation in the public interest. The history of the *Union Dry Goods* case in the courts of Georgia and in the Georgia Commission, demonstrate that it dealt with the very issue here. The Georgia court held the contract withered in the face of the statute. The only concern was the scope of the duty which the statute gave to the Commission. No proceeding such as the Court below ordered was essential, or suggested, to abrogate the contract as precondition to the exercise of the regulatory powers statutorily enjoined.

Mobile's claim that *Union's* attack was collateral is refuted by the opinions of the Georgia Commission and the

Superior Court (App. 13, 9). But the short answer is Mobile's attack is collateral, for, at Docket G-2227, it attacked an order issued in a different proceeding at Docket G-2210 in the absence of the parties at interest in the latter proceeding. The Commission cannot achieve and exercise power by a collateral attack, it cannot exercise directly; nor may an order of an administrative agency be attacked in a collateral proceeding any more than a court judgment. Mobile not appealing pursuant to Section 19(b) from the order in G-2210 is concluded thereby.

The Act, enacted under the ample Commerce Clause power, does not admit of fragmentation, paralysis, restriction, or escape through private contracts. It follows, then, that a rate fixed in a contract is without any protection or vitality *when in conflict* with governmental regulation and is subject to be shaped in accordance with the will of the statutory provisions.

1. Considerations of individual hardship do not militate against or vary application of the commanding dominance of the statute to the private contract. Thus, claims of economic prejudice, inability to contract where private interests make contract desirable, etc., are inadmissible against the statutory scheme. They do not constitute grounds to be urged to the courts, but must be asserted to Congress.

C. The decision below ignores the express scheme of the Act, nullifies Section 4, results in judicial amendment of the statute, and produces utter chaos and confusion in its administration.

1. The holding that recourse of the natural gas company and the Commission to Section 4 is prohibited, until the contract has been abrogated in a special proceeding for that purpose, destroys the Congressional purpose and abrogates the provisions of Section 4, which this Court has called the "heart of the new regulatory system." It leaves a vacuum in the Act.

The statute places the continuing duty on the natural gas company to propose rates under Section 4(d) to hold

constant the "just and reasonable" level required by the public policy of Sections 4(a) and (b), thus depriving the natural gas company of capacity or power by contract to block or deviate the even, equal application generally. The decision below substracts the onus of initiating changes from the natural gas company, and substitutes the Commission's duty under Section 5(a), which does not permit a rate increase. The result is chaos and confusion compounded: for the natural gas company is not authorized to initiate a Section 5(a) proceeding; the distributing company, having a contract, could not be expected to; and the resulting burden on the Commission to initiate a 5(a) proceeding (which Section standing alone is inadequate to the purposes of the Act), would be overwhelming, if not impossible, in view of the Commission's other statutory duties. It follows that the decision manacles the Act by permitting contracts to frustrate its primary purposes. This destroys the uniform and monolithic "just and reasonable" of Section 4, and warrants regulation only to those isolated areas excluded from the protection of private contracts.

This unnatural result is underscored by the admission below that Section 4(e) "makes * * * plain" that in the 4(e) hearing the "dispositive question" is the justness and reasonableness of the proposed rates, but avoids the necessary consequence, i.e., their establishment, by the holding that contract existence denies Section 4 to the Commission and the natural gas company. Such reasoning champions private considerations which the parties to contracts believe promote their own interests, in preference to the injunction of Congress that the Commission should consider rates only from the public interest protection command of the statute.

Section 4(d) does not prohibit change "until first" the Commission has "a proceeding to destroy a current rate." The thirty-day notice of Section 4(d) and the discretionary judgment of the Commission, with or without hearing, that

the proposed rates are just and reasonable are adequate protection to the contract holder and others who may be affected to meet the most rigid requirements of the law. This the Court below ignored and required rejection and dismissal with refunds — all prohibited by the Act. The Court below fell into judicial legislation by this excissive handling of Section 4 for both deletion and addenda are required to accomplish the ordered result. So the Court below intruded into the "posted" legislative field of rate-making exclusively confided to the discretion of the Commission.

The holding is not helped by Mobile's contention that Section 4(d) applies only to rate modifications already agreed to to prevent change in filed rates by secret agreements. The filing and thirty-day notice of Section 4(d) prevents secrecy. Destruction of secret agreements was not the goal of Congress; rather it was by even and equal general regulation to destroy the abuses which Section 1(a) identified as required in the public interest. Secret agreements could not exist, for the only lawful rate which may be charged or paid is the filed rate. Payment or collection of any other rate would bring subjection to the heavy penalties of Section 21 of the Act.

Statutory ineffectiveness would control if the decision stands. Section 5(a) provides for hearing on complaint against a current and effective rate. The Commission after hearing must find the just and reasonable rate. It may lower the current rate to the level found, but may not raise rates to such level, for that can only be done by a filing pursuant to Section 4(d). The natural gas company cannot initiate a 5(a) proceeding. Section 5(a) contains no grant of authority to determine unreasonableness as prelude to a Section 4(d) filing. The Act stands judicially construed as entitling parties affected thereby only to that rate made specific by discretionary Commission action which proceeds upon the making of "pragmatic adjustments": not the

desires, upon whatever ground, of parties expressed in private contracts. Clearly here the decision orders the Commission to substitute for its discretionary judgment the Court's judgment as to how the Commission may proceed to find "just and reasonable," as well as what is "just and reasonable," i.e., the rate. The direction in this collateral proceeding to the Commission to recall its order in Docket G-2210 also breaches the rule that an application for increased rates may not be dismissed without a hearing. The Commission is required to violate the Act; United is deprived of its rights guaranteed by that Act.

Equally without force is the suggestion that a suspension under Section 4(e) is equivalent to the contract hearing ordered. Suspension was originally conceived to prevent effectiveness of new and increased rates pending administrative investigation of their reasonableness; not for the purpose of preserving a pending rate pending administrative determination of its unreasonableness. Right of collection, a property right, was submerged during a reasonable period in order to balance the equities and conveniences of the parties, for it was considered that the delay was not unduly violative of the property rights and yet guaranteed free opportunity for investigation. These considerations were examined at length in the debate on the Mann-Elkins Act (45th Cong. Rec. p. 3465-3472) and have been expressly approved as applicable to the Natural Gas Act. *Hope Natural Gas Co.* v. *F. P. C.* (1952, 4 Cir.) 196 F. 2d 803, 809.

The Court below also found comfort in the statement of the Congressman who introduced the amendment prohibiting suspension of indusfrial resale rates that it applied only to "short-term contracts"; but no such condition appears in the language of the Act. Such legislative history may not be used to amend the statute. *Dameron* v. *Broadhead* (1953) 345 U.S. 322.

Section 4(e) further refutes the suggestion that suspension is equivalent to the contract proceeding ordered. If

that had been the intent of Congress, industrial resale rates would have been subject to suspension and all suspension would have been obligatory, not discretionary. No difference exists in the dignity of common law contracts for resale for industrial use and domestic resale contracts. If the Court intends a difference, addenda in Section 4(e) is immediately required; if no difference be intended, the Court's reasoning would produce an invalid and unreasonable classification.

The suggestion that a filing under Section 4(d) where a private contract exists is "unilateral" and thus unlawful, was repudiated by the Fifth Circuit in *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (1954) 217 F. 2d 73; 78. Compliance with the statute cannot be unilateral. Furthermore, Sections 4(d) and (e) of the Act were taken almost verbatim from the Interstate Commerce Act and must be interpreted in the light of that Act, for where provisions of one statute have been adopted by another the interpretation which has been authoritatively placed upon the former applies to the latter also. In *Armour Packing Co. v. United States*, (1908) 209 U.S. 56, this Court held that an ex parte filing of an increased rate under the Interstate Commerce Act which became effective without an administrative hearing, was the only rate that could be charged and abrogated rates fixed by pre-existing contract.

State and Federal Courts have also held that rates filed ex parte under the provisions of state public utility statutes, taken from the Interstate Commerce Act and containing provisions substantially similar to Sections 4(d) and (e) of the Act were the only lawful rates which might be charged, and to the extent that rate provisions of any existing contract between a utility and a consumer provided for a rate different from the rate so filed, such contract was void.

If, as seems plain, Congress intended to fill the vacuum of the gap between the producer and the distributor with a comprehensive scheme of regulation, it should not be

held that it left a hiatus by denying Section 4 applicability where there was a private contract. Mobile's contention would cut out the "heart" and leave the Act without a life-giving circulatory system. The Act is impervious to attrition by private contracts.

2. The holding that contract provisions and rights are not subject but are superior to provisions of the Act and are controlling over the regulatory scheme until found to be against public interest in a proceeding brought for that purpose is in conflict with other decisions from other Circuits:

> *Mississippi Power & Light Company* v. *Memphis Natural Gas Company* (1945, 5 Cir.) 163 F. 2d 388, cert. den. 332 U.S. 770 ("favored nation" clause for lower rates);
>
> *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Company* (1949, 6 Cir.) 173 F. 2d 784, affirming (D.C.E.D. Mich. 1948) 80 F.S. 27 (Specific performance of contract provision for firm delivery volume against Commission order for ratable delivery);
>
> *Mississippi River Fuel Corporation* v. *F. P. C.* (1941, 8 Cir.) 121 F. 2d 159 (escalation clause for higher rate in filed contract);
>
> *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (D.C.E.D. Tex. 1953, unreported, reproduced R. 73-81) affirmed (1954, 5 Cir.) 217 F. 2d 73 (arising under same order of July 10, 1953, in Docket G-2210; identical with Mobile's case except *Tyler* rates were domestic and not industrial resale. Act held controlling).

The foregoing cases all stand for the proposition that rate and other provisions in contracts have no force before the Act and are subject to change and control by statutory procedures without protection of special privileges arising from "contract."

Conflict also appears with the decision of the Third Circuit in *Mississippi River Fuel Corporation* v. *Federal Power*

Commission (1953, 3 Cir.) 202 F. 2d 899 (petition for cert. dism. 345 U.S. 988). The Commission dismissed a rate filing — precisely the act the Court here mandatorily orders. In *Mississippi* the Court held such dismissal had no color of statutory authority. There is no distinction between *Mississippi's* case and *Mobile's* case: The situation is precisely the same.

Further conflict appears in this: In *Mississippi*, the Court held the dismissal and rejection could not be supported by judicial procedures such as motion to dismiss for failure to state a claim, or motion for summary judgment, because such procedures were not expressly granted in the Act and were therefore not available. Yet here the Court orders refund by applying comparable equitable principles upon the same bases it held unavailable in *Mississippi*.

These conflicts, and particularly that with its own decision in *Mississippi*, demonstrate the accuracy and correctness of Judge Hastie's dissent.

3. The cases relied on by the Court below do not support its decision. *Wichita Railway* v. *Public Utilities Commission* (1922) 260 U.S. 48, involved a Kansas statute and its application under Kansas law. An examination of the case demonstrates that the Kansas statute was not comparable to the Act. It did not contain any provisions comparable to Section 4, which expressly authorizes rate changes. Section 13 of the Kansas statute provided for hearing upon complaint and authorized the fixing and substitution of rates even though higher — power not granted under Section 5(a).

This case is rather ruled by *Midland Realty Co.* v. *Kansas City Power & Light Co.* (1937) 300 U.S. 109, which the Court admitted "does lend some support to the position of the Commission and the intervener" (R. 145) but which it would not follow. The Missouri statute in *Midland's* case comes from the Interstate Commerce Act and contains provisions substantially similar to Sections 4(d) and (e) of the Act, whereas *Wichita* does not. *Midland* does not merely

"lend some support": it makes right the decision of the Commission.

The analogy sought for *Federal Power Commission* v. *Niagara-Mohawk Power Corp.* (1954) 347 U.S. 239, is artificial and inapposite. No private contract was posed as preventing Federal regulation. That case involved a conflict between rights claimed under a license from the Federal Power Commission with rights claimed under conveyance and title held under the State, empowered to convey. There, this Court said the statute was framed so as to preserve the very rights claimed to be destroyed by the Federal enactment. Here, Congressional intent is equally plain that the Act shall be superior to all rates reserved in contracts, and that no rate can be fixed or filed but pursuant to initiation under Section 4, or to establishment by the Commission in a 5(a) proceeding.

Hinkle Dry Goods Co. v. *Wichison Industrial Gas Co.* (1933, 10 Cir.) 64 F. 2d 881; *Kaul* v. *American Independent Telephone Co.* (1915) 95 Kan. 1, 147 Pac 1130; *Railroad* v. *Court of Industrial Relations* (1923) 113 Kan. 217, 214 Pac. 797; and *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.* (1924 D. C. R. I.) 295 F. 895, are all like *Wichita's* case and subject to the same inapplicability.

Arkansas Natural Gas Co. v. Railroad Commission (1923) 261 U.S. 379, is not to the purpose, for the Arkansas statute expressly provided that the Railroad Commission had no jurisdiction or power to modify or impair existing contracts for gas supply, etc.

Southern Utilities Co. v. *Palatka* (1925) 268 U. S. 232, has no connection with the issues here. It does not involve a regulatory statute or one claimed to control contract rates. It was a controversy between a city and utility to whom it had granted a franchise and involved the issue whether the utility had to comply with the franchise.

Colorado Interstate Gas Co. v. *Federal Power Com.* (1944, 10 Cir.) 142 F. 2d 943, affirmed 324 U.S. 581, was a Section

5(a) proceeding instituted by the Commission on its own motion and upon complaint of certain municipal and state regulatory bodies, to determine whether current effective rates were just and reasonable. There was not involved, as here, the question of whether a Section 4 filing superseded a rate fixed in contract. Properly read, that portion quoted by the Court below means nothing more than that a private contract rate is subject to the provisions of Section 5(a) and yields when the "fact" of unreasonableness is made to appear. This is correct; but touches at no point the issues involved here. See, rather, that portion of the opinion under the heading "Application of Prices Fixed by Contract Prior to Effective Date of the Act" at p. 593, which deals with the principal applicable here.

Probably Mobile will rely upon the decision of the District of Columbia Circuit in *Sierra Pacific Power Company* v. *Federal Power Commission, et al* (1955) ..... F. 2d ....., pending on writ of certiorari Nos. 51, 53, this Term. This case arose under the Federal Power Act (16 U.S.C. 824, et seq.) Several differences between *Sierra* and this case render *Sierra* inapposite:

(a) Unlike Section 5(a) of the Act, comparable Section 206(a) of the Federal Power Act has no limitation on those who may file complaints. Thus under the Power Act the utility may file complaint against its own rate, a right expressly denied the natural gas company under Section 5(a).

(b) The contract in *Sierra* was twice approved by the California Commission on condition no loss should be passed to customers but should be assumed by stockholders. Apparently no question was raised of the jurisdiction of the California Commission to require the condition nor of its power validly to except the special contract rate from the uniform level applicable to all consumers.

(c) *Sierra* fell into the same fundamental error of the Court below in giving weight to "special circumstances",

"inducements", "new business", and like situations considered to result in equity requiring enforcement. The evidence was incompetent for the same reasons stated by the Georgia Courts in *Union Dry Goods Company* v. *Georgia Public Service Corporation* (1914) 142 Ga. 841, 83 S.E. 946; (1916) 145 Ga. 658, 89 S.E. 779, affirmed by this Court (1919) 248 U.S. 372.

In any event, such questions address themselves to Congress and not to the courts.

(d) Finally, citing *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company* (1951) 341 U.S. 246, 251, *Sierra* held that both the contract and proposed rates might be in the "area" of reasonable rates, in which event the statute would give effect to both rates until the contract rate was found unreasonable. The *Montana-Dakota* case rejects these arguments, making plain that the only just and reasonable rate was that rate made specific by exercise of the Commission's discretionary judgment. Furthermore, it held the courts without power to assume a right to a rate other than one ordered by the Commission on the ground that in its judgment such rate was the only or more reasonable one.

In this trespass upon the exclusive discretionary province of the Commision, the Court of Appeals in *Sierra* and in this case are assuming and exercising the legislative rate-making function which the Fifth Circuit refused to do in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1947) 162 F. 2d 388, cert. den. 332 U.S. 770; and *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (1954) 217 F. 2d 73.

II.

The Court below in holding that all monies collected on the basis of the "erroneous order" were "unlawfully collected" and should be returned to Mobile, is in conflict with the holding of this Court and of the Fourth and Eighth Circuits that under the Act the Commission has no power

to make reparations, for its power to fix rates admittedly is limited to those "to be hereafter observed and enforced." Nor can it order the Commission to exercise a power not granted it by the Act upon the ground that equity countenances it, because the Commission, as an administrative body, possesses only those powers expressly granted and does not have and cannot exercise the additional powers of a court of equity to grant other and further relief, even though that relief would appear to be a reasonable or just consequence of the exercise of a granted power.

Another and fundamental lack of power to make the order exists, because the point ruled by the Court below was not preserved by Mobile in its petition for rehearing to the Commission, and thus is not subject to consideration or action by the Court below. Section 19 of the Act; *Federal Power Commission* v. *Colorado Interstate Gas Co.* (1955) 348 U.S. 492. Mobile's motion for rehearing specified the ground that monies collected were subject to refund should the Commission, after hearing, find all or any portion not just and reasonable (R. 39, Par. 1c; R. 43-4, Section B). The motion for rehearing contained no ground that refund under the equitable principles was proper because of an illegal filing which the Commission had no power to receive which rendered collections unlawful. Mobile expressly admitted that the Commission "had a right" to order the hearing (R. 11, Par. 10). The point reserved in the motion for rehearing was expressly stated not to be reached by the Court (R. 154). Instead, the Court below, sua sponte, held the filing void and as a Court, asserted power under familiar equity principles to order refund. This it had no jurisdiction or power to do. In addition, the Act denies such power.

Clearly, Section 4(e) gives the Commission discretion on suspendible rates to require a bond for refund; but as clearly, denies power to order suspension or refund of monies collected pursuant to rates for resale for industrial use only. This, of course, does not affect the power granted

by Section 4(e) after hearing to reduce proposed industrial resale rates pro tanto the amount found not to be just and reasonable. This phase of the holding is in square conflict with the rationale of its opinion in *Mississippi River Fuel Corp. v. Federal Power Commission* (1953) 202 F. 2d 899, (petition for cert. dism. 345 U.S. 988).

Thus since the Commission is possessed only of powers delegated by the basic Act and has no power that is inherent by virtue of its existence, it follows that the Commission is without power, and the Court below equally without power to direct exercise by the Commission of a power not delegated — power to order refunds under judicial concepts of equitable restitution.

The power of the Court on review is strictly limited to determination of whether the allowance or disallowance by the Commission is in accordance with the precept of the Act. See *State Corporation Commission of Kansas v. Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, at 184. Nor does Section 19(b) of the Act vest the Court below with power on review to order the Commission to take action not granted by the basic Act.

The cases cited by the Court are cases dealing with the age-old rule of restitution under the governing principle that where one has lost by the enforcement of a court judgment subsequently reversed, he is equitably entitled to restitution and so far as discretion deems justifiable, to have corrected what had been wrongfully done. This doctrine is applicable only to court judgments and not to orders of an administrative agency.

Mobile paid no monies pursuant to any order of the Court below, or of the Commission. It paid monies by the direction of the Act itself; for these rates being for the sale of natural gas for resale for industrial use only, the Commission had no alternative under Sections 4(d) and 4(e) of the Act save to permit the rates to go into effect at the end of the thirty-day period provided for in Section 4(d), subject to the hearing ordered. The Commission order

admitting United's filing was the simple memorandum of the performance of a mandatory act by the unambiguous terms of Section 4.

Restitution is a way whereby courts may remedy and rectify their own mistakes; not a procedure whereby courts remedy or rectify the mistakes assertedly made by other constitutional bodies. The Court below did not seek to remedy or rectify a mistake of its judgment, for no monies were paid under the compulsion of its judgment. It sought to remedy what it held to be an invalid exercise of discretionary statutory regulatory power by the Commission. The express language of Sections 4(d) and 4(e) of the Act vest an exclusive discretion in the Commission whether a proposed rate shall become effective without any notice, or upon some notice as specified, or with or without a hearing. The statutory language is "may"; not the obligatory, "must". Such options are addressed to exercise of quasi-legislative functions by the Commission. If it be assumed that the mandatory order was erroneous, it was error in the quasi-legislative field and not the mistake of a judicial body vested with power to exercise the doctrine of restitution. The decision is an encroachment upon the legislative function and also constitutes an attempt, without historical or logical basis, to extend into the administrative legislative field concepts clearly applicable only in court proceedings.

Research has produced no instance of a federal court directing an administrative agency to require restitution under similar circumstances. Congress, having initially denied the Commission power to order reparations, the courts may not achieve the same result by the simple expediency of adjudicating as "void" an order mandatory by the basic Act.

Argument

I.

All rates provided in private contracts and provisions respecting the service to be rendered are inferior to the

Rate Regulatory Power under the Act, and are unenforceable against the paramount right and power of the Commission to fix and determine just and reasonable rates, as well as the duty of the Natural Gas Company under Section 4 of that Act to initiate just and reasonable rates, and such rates, whenever so initiated by the Natural Gas Company and permitted by the Commission to be filed, supersede and replace, by operation of law, such contract rates.

A. The Design Of The Act Confirms This.

Section 1(a) of the Act shows that Congress, in identifying the public interest which required regulation, was dealing with the problems laid before it by the report of the Federal Trade Commission.[11]

The transmission was the famous "gap" which it was the purpose of the Congress to regulate. See *Missouri v. Kansas Natural Gas Co.* (1924) 265 U.S. 298; *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927) 273 U.S. 83; *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, (1947) 332 U.S. 507. Clearly it was the intent to exercise the power of the Commerce Clause for complete preemption of the regulated area.

The Act in Section 4(a) requires that "all rates and charges * * * *shall be* just and reasonable," and declares "any" rate or charge not "just and reasonable" to be "unlawful." Section 4(b) prohibits the natural gas company

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[11] Investigation pursuant to S. Res. No. 83 70th Cong. 1st Sess. approved February 15, 1928 as extended by S. J. Res. No. 115, 73rd Cong. 2d Sess. approved June 26, 1934; final report of the Federal Trade Commission to the Senate being S. Dock. No. 92, 70th Cong., 1st Sess. This report recognized the division of the industry into producing, transmission and distributing. The problems and evils covered by the report were alleged to exist because of the position and practices of the interstate transmission companies stated to control the "vital line of transportation" between the producer and the consumer; that the transmission was one of the most competitive situations to be found involving commodities or public utility service (p. 112) so that an "interstate monopoly" was enjoyed (p. 113); and pointed out that states were unable to regulate because of Supreme Court decisions holding that under the Commerce Clause such transactions were not subject to state regulation (p. 613, 614).

from making any unreasonable difference in rates "or in any other respect," either as between localities or as between classes of service. The Act contains no language of exception or modification to these declarations of public policy. In completely occupying the "gap" Congress was not derelict to create a "gap" by leaving the regulated utilities free to execute contracts which would deviate, even prevent, regulation as could be done under the decision below.

In evaluating the Congressional purpose and intent, it is significant that the Act nowhere gives any customer, purchaser, or contractee, authority to propose or initiate rates; but the natural-gas company has the mandatory duty to charge only just and reasonable rates; and exclusively under Section 4 to propose and initiate changes. *Pennsylvania Water & Power Co.* v. *Consolidated G.E.L. Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 U.S. 906; *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.* (1951) 341 U.S. 246; *Hope Natural Gas Co.* v. *F. P. C.* (1943, 4 Cir.) 134 F. 2d 287, reversed on other grounds 320 U.S. 591; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426; *United States* v. *Illinois Central Railway Co.* (1924) 263 U.S. 515. In the first case the Fourth Circuit said:

> "One of the most important duties of a public utility inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions * * *". (p. 567).

The pronouncement of the foregoing decisions merely confirm the view expressed in the House Report on the bill which became the Act; "Subsection a (i. e., Section 4(a).) imposes upon natural gas companies the duty of charging just and reasonable rates * * *."[12]

[12] Hearings on H.R. 6586, H. Report 709 to accompany H. R. 6586, 75th Congress, 1st Session.

On the contrary Section 5(a) requires a hearing and is upon complaint against a filed and currently applicable rate. If the Commission elects to have a hearing under Section 4(e) its powers there are the same as the powers it exercises under Section 5(a). *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 805; *State Corporation Commission* v. *Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, 183. In assaying the Act, this Court said:

> "The Federal Power Commission was given broad powers of regulation. The fixing of 'just and reasonable' rates (Section 4) with powers attendant thereto was the *heart* of the new regulatory system." Federal Power Commission v. Hope Natural Gas Co. (1944) 320 U.S. 591, 611.

Evaluating those "broad powers of regulation," this Court said that Congress had entrusted its administration to the Commission, not to the courts, thus apart from the requirements of judicial review, "it is not for us to advise the Commission how to discharge its functions" (p. 618).

Thus Congress proposed a comprehensive scheme of rate initiation and regulation that set uniform application to all alike, was by its very language and design wholly exclusive and inclusive, and obviously was intended to supersede and replace all other rates however made or agreed.

The hearings leave no doubt that the Congress intended the scheme of the Act to replace every other device including contract provisions, for in no other way could the exclusive integrity of the statutory scheme be inviolably preserved.[13]

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[13] The following excerpts are from the testimony given by Mr. DeVane, then Solicitor of the Federal Power Commission, before the Congressional Committee, Hearing before House Committee on H.R. 11,662, 74th Congress (2d Sess.) from pages 28-29:

> "MR. LEA: Mr. DeVane, under what conditions would rates be put into effect? That is, what would be the procedure?
>
> MR. DeVANE: In the beginning?
>
> MR. LEA: Yes.

careful examination of the hearings quoted in the opinion below (R. 149-150) clearly does not support but makes against the conclusion drawn therefrom in support of the holding. They show that the quoted colloquy revolved around a contract situation classic to the policy stated in Section 1(a). The complete exchange shows aggressive support by the Illinois Commerce Commission of the Act which, pursuant to Section 5(a), would permit regulation and control of the contract.[14] With equal clarity they demonstrate that the

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MR. DeVANE: The Companies would simply file their schedules.

MR. LEA: And those schedules would prevail unless the Commission saw fit to, after a hearing and notice, establish a rate?

MR. DeVANE: Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing are the rates that will continue in effect until they are changed either by the company, as provided in Section 4, or by the Commission after hearing.

MR. LEA: There would be, I take it, no duty upon the Commission under this Bill in the absence of complaint or just reason to call for interference to establish rates.

MR DeVANE: No, sir; the Commission can only establish rates after investigation and hearing.

Now, that investigation can be undertaken under Section 5 of the bill; either on the Commission's own initiative or upon complaint.

* * *

MR. COOPER: And anyone who wants to file a complaint goes to the Commission; is that right?

MR. DeVANE: That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under Section 4(d). After they have filed them with the Commission and announced those new rates, the Commission has the power to suspend and investigate, and the suspending power extends for a period of five months."

[14] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, First Session, on H.R. 4008, March 24-25, 1937:

At Page 24: Harry R. Booth is identified as "Acting counsel for the Illinois Commerce Commission" regulating intra-state rates in Illinois.

At Page 24: Mr. Booth states enactment necessary to control inter-state wholesale rates, otherwise people in Illinois might be compelled to pay in the ensuing ten years from 20 to 35 million dollars in excessive charges to Natural Gas Pipe Line Company of America.

At Page 25-27: Mr. Booth traces the organization, growth, and corporate connection of Natural Gas Pipe Line Company of America, and details litigation in Federal Courts, in which the Illinois Commission was seeking information on the rate structure of Natural Gas Pipe Line Company as an aid to regulation of intra-state activity.

At Page 27-32: Is set forth the bill of complaint for injunction of Natural Gas Pipe Line Company of America against the Illinois Commerce Commission and the Attorney General of Illinois in the United States District Court for the Northern District of Illinois, which bill is based upon the assertion that the Illinois Commission

colloquy had no bearing whatever upon Section 4, or whether a filing under Section 4(d) would supersede and replace a private contract rate. Under the comprehensive scheme of the Act that particular Company would have been required under Section 4(c) to file as its initial rate schedule the contract involved in the colloquy, following which the Illinois Commerce Commission could have complained only pursuant to Section 5(a) of the Act.

This Court again declared the utter lack of power in the courts in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251, by saying:

> "But the prescription of the statute is a standard for the Commission to apply, and, independently of Commission action creates no right which courts may enforce."

and that the only legal rate was the filed rate and that "not even a court can authorize commerce in the commodity on other terms," for "the right to a reasonable rate is the right to the rate which the Commission files or fixes, * * *"

Light on this problem is had from *Armour Packing Company* v. *United States* (1908) 209 U.S. 56, which arose under the Elkins Act Amendment to the Interstate Commerce Act from which this Act is in direct descent. The contract was made at the then filed and published legal rate. Thereafter a different rate was filed. The claim that the law did not expressly destroy the right of contract was rejected for the Court said this lost sight of the "central and controlling purpose" which required "all shippers" treated alike, and but *one* rate and *that* "the filed and published rate, equally

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is without power to reach the interstate activities of the complainant; i.e., a suit behind the shield of the "gap" which it was the design of the Act to occupy.

At Page 33-42: After discussion between Mr. Booth and members of the Committee on various phases of the proposed bill, Mr. Halleck brought the question back to the 15-year contract of the Natural Gas Pipe Company, following which the colloquy referred to in the opinion (R. 749-150) occurred. Thus the colloquy relied on could only refer to an existing contract, and not to a change in rates under Section 4(d).

known by and available to every shipper" (p. 80). The Elkins Act prohibited the giving and receiving of transportation at less than the published rate, and the Court noted that the one rate fixed and required by the statute was subject to change "in the only way open by the statute." Thus, if rates were subject to alteration by special agreement, the statutory purpose would fail and one rate would not be established "known to all and from which neither shipper nor carrier may depart." The Court summed up:

> "It has provided for the establishing of one rate to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abusive unequal rates which it was the design of the statute to prohibit and punish" (p. 81).

Here, the Act required the charging and collecting only of just and reasonable rates and made all other rates illegal (Section 4). The sole touchstone of just and reasonable is that rate which is made specific by the Commission. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251; *Cities Service Gas Co.* v. *F. P. C.* (1946, 10 Cir.) 155 F. 2d 694, 698-9, cert. den. 329 U.S. 773.

To the complaint that *Armour's* construction and holding would put the shipper at the mercy of the carrier, who could arbitrarily change the rate upon the faith of which contracts had been entered, the Court gave the short answer that Congress had the inherent power under the Interstate Commerce Clause to make such regulations, and "* * * such considerations, inconvenience and hardship address themselves to the law-making branch of the Government" (p. 82). The Court then concluded that if a shipper saw fit to make a contract covering a definite period for a rate in force at the time, he must be taken to have done so subject to any possible change in the published rate in the manner fixed by statute.

Thus the Court considered and repudiated the claim that the contract had standing against the statutory requirement for it reasoned that the destruction of the contract was necessary to give vitality to the prohibitions of the Act (compare Sections 4(a) and (b)) and that the parties could not acquire the power during the life of the contract "to continue to execute it, although a violation of the act to regulate commerce might arise from doing so" (p. 83).

The Court here sought escape from the philosophy of *Armour* by reasoning that it was inapposite, because neither the Elkins Act nor the Interstate Commerce Act permitted contracts to be filed[15]. The attempted distinction is not to the purpose. The rationale of *Armour* was to emphasize that where the Congress under the Commerce Clause established regulation intended to be uniform and applicable to all alike, no arrangement, not even a private contract unmentioned in the Act, could be permitted to stand in the way of the regulatory intent of Congress in its enactment. So here Congress intended and stipulated that all rates other than just and reasonable rates were unlawful. It expressly provided for contract inferiority by subjecting contracts to the changes and procedures of Sections 4 and 5. The Act leaves no room for doubt that the regulation intended was even and uniformly applicable to all alike. The Natural Gas Act comes from the Interstate Commerce Act and must be held to have the gloss that was inherent in the Interstate Commerce Act. Cf. *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803. The language of Sections 4 and 5, both of which expressly permit changes in contracts undercuts the attempt to distinguish *Armour*.

Furthermore, the context of contract versus regulation was already set in this respect, for before *Armour* it had been established that a public utility was without capacity

[15] R. 150 FN 10. Mobile sought escape in the same position (Br. in Opp. p. 7-8).

to make a contract that would have effect to restrict or interfere with its compliance with statutory requirement, because such would be against public policy. See *Gibbs* v. *Consolidated Gas Co.* (1899) 130 U.S. 396. Shortly after *Armour* came the decision in *Producers Transportation Company* v. *Railroad Commission of California* (1919) 251 U.S. 228, which announced that the regulatory power was superior to a filed and approved contract because the exertion of the regulatory power cannot be "prevent[ed] or postpone[d] by contracts for future transportation."

B. Mobile's contract was made and held subject to the exercise by Congress of its power under the commerce clause and its contract provisions for rates conflicting with the filed rates, which are the only legal rates tolerated by the Act, must yield to and be replaced by such filed rates, for Mobile cannot remove such rates from the statutory initiation or regulation stipulated by Congress in the Act by making a contract about them.

The relative weight of private contract against governmental or public regulation in the public interest has long been settled. In *Union Dry Goods Company* v. *Georgia Public Service Corporation* (1919) 248 U.S. 372, all of the leading cases on the issue of contract versus public statutory regulation were reconsidered and recapitulated.[16] There, a contract dated July 18, 1912, stipulated for rates for electric light and power service for five years; a subsequent order by the Railroad Commission of Georgia increased rates and declared all contracts in conflict therewith to be illegal. The classic claim was made of impairment

[16] *Manigault* v. *Springs* (1905) 199 U.S. 473, 480; *Hudson County Water Co.* v. *McCarter* (1908) 209 U.S. 349, 357; *Louisville & N. Ry. Co.* v. *Mottley* (1911) 219 U.S. 467, 482; *Chicago B. & Q. Ry. Co.* v. *McGuire* (1911) 219 U.S. 549, 567; *Atlantic Coast Line Railway Co* v. *Goldsboro* (1914) 232 U.S. 548, 558; *Rail and River Coal Co.* v. *Ohio Industrial Commission* (1915) 236 U.S. 338, 349.

of contract obligation and deprivation of property without due process. This Court rejected those contentions, collating and quoting from numerous of its decisions to demonstrate how well settled such questions were. It was declared that contracts had to yield to public regulation, otherwise they would be superior to and defeat the very purpose of the regulation. Liberty of contract was held to imply absence of arbitrary restraint, not immunity from reasonable regulation. All contracts had to be understood as being made in reference to the exercise of the rightful authority of the Government. In fact, the statute itself was imported into the contract and thus the provisions of Section 4 relating to change by the natural gas company were imported by law into the terms of Supplement No. 10 to Supplement No. 7, the contract Mobile seeks here to enforce above regulation.[17] The question was aptly put in *Hudson Water Company* v. *McCarter* (1908) 209 U.S. 349, where in discussing the conflict between private right of property and the state's exercise of its sovereign and constitutional power, such as police power, the Court said:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are

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[17] The general tenor of the decision below seems to turn on the declared absence of express interdiction of contracts by the Act. Apart from the language of Section 4(d) which expressly authorizes change and superseding of contract by filing, the philosophy in the *Legal Tender Cases* (1871) 12 Wall. 457, 20 L.Ed. 287, seems sufficient. There it was also claimed that the contract was preserved because there was no express condemnation, but this Court, rejecting, said:

> "It is, then, clear that the powers of Congress may be exerted, though the *effect* of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the Constitution or in any of the decisions of this Court" (p. 550; 312).

Though no constitutional issue appears here, the quotation merely emphasizes the applicability of the language. Clearly Congress stipulated for the statutory regulation irrespective of the hurt that would result to those in the way of the statute.

other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

"* * * But it is recognized that the state as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of land most immediately concerned." (p. 355).

In considering the evils the Act was designed to contain, Congress declared only a "just and reasonable" rate should be allowed; vested the Commission as administrator with unlimited and undefined discretion to determine what is "just and reasonable"; and denied to all persons, save only the natural gas company, the continuing duty and right to propose for Commission consideration such rates. This was the part of wisdom, for surely the natural gas company is best qualified to evaluate its own necessities in initiating rates that would be just and reasonable for its operations and thereby conform to the declared governmental policies of Sections 4(a) and 4(b). The procedures and discretions of Sections 4 and 5 insured over-all supervision by the Commission guaranteeing integrated equality of regulation to all.

This Congressional policy makes fundamental and automatic the rejection of the contract rate save during that time that the contract rate is the current filed and legal rate. The Commission's overriding duty only to permit; and the natural gas company's recurring obligation always to propose "just and reasonable" rates can brook no restraint. *Tyler Gas Service Co. v. United Gas Pipe Line Company* (1954, 5 Cir.) 217 F. 2d 73.

The Court below adopted Mobile's contention that the rule of *Union Dry Goods'* case is good only in collateral attack, but the position is without force, for that is to say

that it lies within the power of private parties by their choice of action or inaction to vest Congress and the Commission as its statutory agent with power. The authority of Congress stems from its interstate powers; effective control from the exercise of that power becomes active whenever and wherever the unfettered application of that exercise is challenged or in collision. Hence, all contracts even though made before enactment are made subject to, and powerless to defeat, exercise of the paramount governmental right. *Louisville & N. Ry. Co.* v. *Mottley* (1911) 219 U.S. 467, 482; after enactment, (as in Supplement No. 10 here), the statute is imported into and controls the contract. *Vieth* v. *Sixth Ward Building & Loan Assn.* (1940) 310 U.S. 32. It follows that the statute is at all times the complete master of the contract.

The short answer to Mobile's claim that *Union* was a collateral attack is that Mobile's attack is collateral. Mobile at Docket G-2227 attacked an order in another proceeding at Docket G-2210; the parties were not the same, the proceeding was a different one; there was no other relief sought than the mere setting aside of the order of July 10, 1953 at G-2210, i.e., the substitution of language and the inclusion of new decrees. The decision below does not revise the order of July 10, 1953, in Docket G-2210; it requires an order entered at G-2227 changing and emasculating the order entered at Docket G-2210. Manifestly the Commission cannot possess power to achieve by collateral attack what it cannot do directly. Furthermore, an order of an administrative agency may not be attacked in a collateral proceeding any more than the judgment of a court may be so attacked — the proper remedy being a direct appeal from the administrative order.[18] Mobile, not having perfected a review of the order of July 10, 1953, in Docket G-2210

[18] *Steele* v. *St. Louis Smelting & Refining Company* (1882) 106 U. S. 447. Held that in an action by patentee's assignee against a third party, a grant of patent by the Land Office was not subject to collateral attack on the

under Section 19(b), said order became final and conclusive. *Sunshine Anthracite Coal Co.* v. *Atkins* (1940) 310 U.S. 381; *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (1953, D.C.E.D. Tex., unreported) R. 73, affirmed (1954, 5 Cir.) 217 F. 2d 73.

Union Dry Goods' case decided the question here against Mobile. The appendix filed with this brief contains the opinion of the Railroad Commission of Georgia in the proceeding out of which that case grew (App. 13). This opinion, entered upon the application of the *Macon Railway & Light Company*, recites that the holding company owning the Macon Railway & Light Company had also obtained control of the Georgia Public Service Corporation, defendant in *Union's* case (App. 18-19). Because of common ownership and in the interest of the public, the Georgia Commission held the hearing in the *Macon* case rather than the *Georgia Public Service Corporation* case, stating it would prescribe "just and reasonable rates for the older and larger company" (App. 21-2) and would thereafter "in a separate order" prescribe the same rates for Georgia Public Service Corporation.

The opinion analyzed under applicable headings the evidence received and investigation made, reflecting merely a customary administrative proceeding to determine rate base, plant account, rate of return, etc. for normal rate-making. Finally, under a topic "Special Contract Rates,"

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ground that the patentee had fraudulently obtained the patent.

Adams v. *Nagle* (1937), 303 U. S. 532, where an administrative officer's determination that a bank was insolvent and ordering an assessment against stockholders was held not subject to collateral attack in an action by the receiver of the bank to enforce assessments against stockholders. To the same effect see *Davis Trust Company* v. *Hardee* (1936, D.C. Cir.) 85 F. 2d 571.

LaRoche v. *Jones* (1850), 9 How. 155, 13 L. Ed. 85.

State v. *Stevens* (1916) 78 N. H. 268, 99 A. 723. Held that the refusal of a State insurance commissioner to license appellant to sell lightning rods could not be attacked collaterally on appeal from conviction for selling without a license. Certiorari would have been the proper remedy.

in this opinion *relating only to the Macon Railway & Light Company*, the opinion declares:

> "The Commission has given careful consideration to the *contentions* of counsel for firms and individuals holding term contracts made at the rates now in effect, that they should stand and be carried out by the Company" (App. 43).

This portion of the opinion (App. 43-4) was pled and is set out in the record in this Court in the *Union Dry Goods Company* case.[19] All special rates, whether in the form of contracts for definite periods or other form, were declared to be illegal. It is thus evident from the Commission's opinion, as United urged below, that it took no evidence as to illegality or as to whether such contracts were against the public interest. It simply took normal evidence on plant, expenses, etc. for the fixing and establishment of just and reasonable rates; and having found those rates declared all other rates, whether in contracts or otherwise, to be illegal. Thus, the opinion shows that a hearing on contract unreasonableness which the Court below ascribed to *Union's* case was not had, and on Georgia Public Service Corporation with which Union contracted, no hearing at all was had. There was no collateral attack. The decision turned on a point of law. The statute was held impervious to contract infiltration.

Also in the appendix to this brief (App. 9) is the opinion of the trial judge denying injunction in *Union's* case. This discloses no assertion that contracts, being superior, were invulnerable to overriding statutory regula-

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[19] The section of the Georgia Commission opinion headed "Special Contract Rates" appears at p. 40-1 as "Exhibit 'B'" in the record in this Court of *Union Dry Goods Company* v. *Georgia Public Service Corporation*, No. 87, October Term 1918, (25,660). The same extract in its context in the Georgia Commission opinion appears herein (App. 43-4). Comparison shows that in copying the section in the record of the case in this Court several errors were made, two or three being of substance. Thus the text of the Appendix is more correct.

tion; but rather that statutory invalidity destroyed power to regulate thus exonerating pristine integrity of contracts.[20] Thus there was no question of collateral attack; there was question of lack of power.

The opinion of the Supreme Court of Georgia, on the injunction appeal 142 Ga. 841, 83 S.E. 946, confirms this. It proceeds to decision upon a point of law based upon the power of the Georgia Commission under the statute, and does not at any place suggest that hearing is necessary

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[20] From trial court's opinion in *Union's* case:

"The plaintiff concedes that if the Railroad Commission has power and authority to fix rates at which electricity may be furnished by companies and corporations engaged in manufacturing and transmitting this useful agency, and to adjudicate contracts already made to be discriminatory, and to order them abrogated, though thereby the consumer will be injured and the electric company benefitted, then the defendant has the right and power, under the orders of the Commission passed in this case, to treat the contract of July, 1912, as abrogated, as of March 1st, 1914. In other words, the plaintiff concedes that unless the order of the Railroad Commission be treated by the Court as void and of no effect, insofar as it orders this contract, and all others similar thereto to be abrogated, it is impossible for this court to grant the prayers of the petition.

"The petition, therefore, attacks the act of 1907 by which the General Assembly undertook to extend the powers of the Railroad Commission so as to take in the control of the electric light and power companies, telegraph and telephone companies, street railroad companies, and other public service companies, enumerated in said act. It denies the constitutionality of this act. It also denies that the act, can if constitutional, confer upon the Commission the right to regulate rates, and prevent discriminating rates. It also specially denies the power of the Commission to abrogate a contract already legally made, between a Light and Power Company and a consumer, alleging that such power impairs the obligation of a contract, and virtually is an ex posto facto law as to contracts." (App. 9-10.)

The Georgia Statute under which the Commission acted in *Union's* case is set out at p. 8-9 of the brief of the Union Dry Goods Company in that case, No. 87, October term, 1918 (25,660), and is as follows:

"The Act of 1907 of the Georgia Legislature, p. 74, Section 5, by virtue of which the Railroad Commission claimed authority to pass its order abrogating the contract of the plaintiff is as follows:

'Sec. 5. Be it further enacted by the authority aforesaid, That the power to determine what are just and reasonable rates and charges is vested exclusively in said commission. The printed reports of the Railroad Commission, published by its authority, shall be admissible as evidence in any court in Georgia without further proof and the schedules of rates made by the Commission and any order passed or rule or regulation prescribed by the Commission shall be admissible in evidence in any court in Georgia upon the certificate of the secretary of the commission. The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads and street railroad corporations, companies or persons owning, leasing or operating street railroads

on the contract. It proclaims that the contract withers and becomes inoperative before the regulation.[21]

The Commission opinion was stated to be in *Macon's* case, but, the Court said "as it referred to the schedule of rates applicable to all public service companies for power and lights supplied in the City of Macon, we deem the opinion as relating to the order fixing the schedule of rates."

On the merits the Union Dry Goods Company offered evidence, comparable to Mobile's allegations in its petition to review surrounding the making of the contract, and of a class with that the Commission apparently received in *Sierra Pacific Power Company* v. *Federal Power Commission* (1955 D.C. Cir.) ..... F. 2d .....[22] The evidence in

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in this State; *provided, however,* that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided that this Act shall not operate as a repeal of any existing municipal ordinance; nor shall it impair nor invalidate any future contract or ordinance of any municipality as to the public uses of such company that shall receive the assent of the Railroad Commission; over docks and wharves and corporations, companies, or persons owning, leasing or operating the same; over terminals or terminal stations and corporations, companies or persons owning, leasing or operating such; cotton compress corporations or associations, and persons or companies owning, leasing or operating the same; and over telegraph or telephone corporations, companies or persons, owning, leasing or operating a public telephone service or telephone lines in this State, over gas and electric light and power company corporations or persons owning, leasing or operating public gas plants or electric light and power plants furnishing service to the public.'".

[21] The crux of its decision is as follows:

"At common law, if a public service corporation served all at reasonable rates, it performed its obligation, but modern industrial conditions demand the further requirement that it shall serve all with equality. They are usually clothed with the power of eminent domain, and this attribute of sovereignty converts them into quasi public institutions; and hence it has become the accepted modern doctrine that public service companies must not only serve the public at reasonable rates, but shall also serve the public efficiently and without discrimination. * * * Manifestly, the public health, progress, morals, and general well-being of a municipality cannot be bound up in a contract with a few individuals. Hence we think that when the Railroad Commission prescribed a reasonable rate for electrical lighting and power companies, the rate thus established had the effect of overriding the contractual rate between the public service company and its patrons, made anterior to the Commission's order" (p. 948).

[22] Pending on writ of certiorari Nos. 51, 53, this Term.

Union's case was excluded by the trial court as being irrelevant.[23] No evidence was offered to show that the rates established by the Commission were themselves unjust and unreasonable. Looking to the future, as it should, the Georgia Supreme Court, affirming, considered the critical examination of the "now and hereafter" to be controlling.[24] The objective was justness and reasonableness under present and reasonably foreseeable conditions; not the abstruse inquiry whether actions taken and facts existing at past times were supported by conditions then existing — considerations impractical to the statutory goal. That should have been the milieu of consideration by the majority below for such is the absolute command of the Act (See Footnote 21, p. 42 herein).

Summing up, the statute of Georgia, like the Act here, prescribed and empowered the Georgia Commission to fix and establish just and reasonable rates. That Commission established maximum rates which the Georgia statute permitted the utility to charge. The Supreme Court of Georgia held that the legislative act in fixing rates in accordance with the statutory scheme rendered those rates immune to any restriction by outstanding contracts and that rates so fixed superseded contracts. That precisely is the point here; that precisely was the point which this Court affirmed and approved in its opinion in *Union's* case. Variation in

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[23] See Bill of Exceptions on exclusion of proffered testimony of witness W. J. Massie, and trial court's ruling sustaining objection. Pages 12-13 of Transcipt of record in Cause 87, October Term, 1918 (25,660), Records of the Supreme Court of the United States.

[24] In a syllabus prepared by the Supreme Court of Georgia on appeal on merits, that Court said:

> "Evidence that at the time of making the contract the parties acted in good faith, and that the contract was made at the solicitation of the Public Service Corporation, which was also making similar contracts with other customers in the city at lower rates than those made with plaintiff, and that the conventional rate paid by the plaintiff afforded the Public Service Corporation a fair and reasonable profit for the service and electricity furnished, was insufficient to overcome the presumption that the rates prescribed by the Railroad Commission, more than a year after execution of the contract, were reasonable" (145 Ga. 658, 89 S. E. 779, at p. 779).

the mode of primary source, police power versus Commerce Clause power, does not affect application of the doctrine.

These considerations, then, indicate the full breadth and sweep of the overriding power of Congress under the Commerce Clause to protect its exercise of that power against amputation, restriction, fragmentation, or escape through private contracts. The rate fixed in a contract, as shown, is without any protection or vitality *when in conflict* with governmental regulation, nor should it be. The claim of "void ab initio" is not to the purpose; it is mere defensive deviation.

1. Hardship, Such As Mobile Urges, Does Not Militate Against Or Vary Application Of The Foregoing Rule.

Mobile claims that if the Commission be correct, and if its contract be held inoperative: (1) Mobile cannot obtain an order of refund should the Commission approve rates at a lower level than proposed; (2) that no contract to sell natural gas at a special rate for a particular purpose could be had;[25] and (3) that under its contract with Ideal Cement it is required to sell gas at a price lower than the increased rates filed by United.

The law is well settled that such claims of hardship do not make against the valid exercise of governmental authority, are not grounds to be urged to the courts, but must be asserted, if at all, in the proper legislative forum. *Louisville & Nashville Railway Co.* v. *Mottley* (1911) 219 U.S. 467; *Armour Packing Co.* v. *United States* (1908) 209 U.S. 56; *Kiser* v. *Central of Georgia Railway* (1916, D.C.S.D. Ga.) 236 F. 573, affirmed 239 F. 718; *Colorado Interstate Gas Co.*

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[25] Below Mobile at Br. p. 9 said: "* * * for it was contemplated at the time the contract was entered into that the rate should be subsantially less than United's general rates to other customers." United denies the statement; but the statement would admit a contract unlawful and illegal because in violation of Sections 4(a) and 4(b) of the Act.

v. Federal Power Commission (1944, 10 Cir.) 142 F. 2d 943, affirmed 324 U.S. 581; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.* (1933) 289 U.S. 266.

C. The decision below ignores the express scheme of the Act, nullifies Section 4, Results in judicial amendment of the statute, and produces utter chaos and confusion in its administration.

1. The Nullification Of Section 4.

The holding that a natural gas company shall not exercise its rights and perform its duties under Section 4, nor shall the Commission permit it, so long as there is a contract between the natural gas company and its customer, until such contract has been abrogated and set aside in a proceeding to determine whether the same is contrary to the public interest: destroys the Congressional purpose and nullifies the provisions of Section 4. This Court is thus for the first time presented with the question of whether Section 4 of the Act which it has called the "heart of the new regulatory system"[26] establishes a comprehensive, exclusive scheme of regulation which provides that change in rates filed by the natural gas company pursuant to Section 4(d) and permitted by the Commission to become effective as the filed rate pursuant to the provisions of Sections 4(d) and 4(e) is superior to and supersedes rates fixed by private contract theretofore filed with the Commission as a rate schedule.[27]

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[26] *Federal Power Commission* v. *Hope Natural Gas Company* (1944) 320 U.S. 591, 611.

[27] Perhaps the closest approach to this question is in *Pennsylvania Water & Power Co.* v. *Federal Power Commission* (1952) 343 U.S. 414, a Section 5(a) type proceeding upon the complaint of the Maryland Public Service Commission and others empowered to make the 5(a) complaint against rates contained in a contract filed as a rate schedule under the Federal Power Act (p. 423). The Commission ordered Penn Water to file schedule of reduced rates in accordance with its order. Penn Water appealed on the ground that the Commission order required it to comply

By the statute, the natural gas company is obligated to initiate rate changes for Commission consideration pursuant to Section 4(d) as often as necessary to meet the obligation of Section 4(a) that all rates at all times shall be "just and reasonable;" by the decision below, the onus is taken from the natural gas company and placed on the Commission to institute a proceeding against such contract filed whenever and as often as necessary to meet the obligation of Sections 4(a) and 5(a) of "just and reasonable" rates. All rates charged or services rendered subject to Commission jurisdiction are necessarily by contract, whether a common law contract such as Supplement 10 to Supplement 7 here or not. Thus the sweep of the decision below destroys all duties and rights of the natural gas

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with a contract void because in violation of the Federal anti-trust laws. In litigation then pending, the Fourth Circuit held the contract in its entirety invalid and unenforceable for such violation. See *Pennsylvania Water & Power Company* v. *Consolidated G. E. L. & P. Co.*, 184 F. 2d 552, cert. den. 340 U.S. 906. This Court said:

> "To the extent that *Penn Water* is being controlled it is by the Commission, acting under statutory authority, not by Consolidated, acting under the authority of private contract terms 'legalized' by the Commission. The duty of *Penn Water* to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts." (p. 422).

This view that the statutory act, not the contract, is controlling is in conflict with the view expressed below. Further this Court said:

> "Section 205(d) provides that 'no change shall be made by any public utility in any such * * * service * * * or contract relating thereto, except after thirty days' notice to the Commission and to the public.' Here instead of following the procedure for changing existing services and practices — a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own — the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order" (p. 423-4).

The Court in pointing out that the proper course for relief of *Penn Water* was to utilize the prescribed procedures of the statute rather than to attack the contract qua contract did not express or suggest reservations such as the decision below relies upon. It seems inherent in the Court's approach in *Penn Water* that the contract as such had no standing so that the compulsion arose from the fact of the Commission's order, it being coincidence that the order paralleled the contract. It is submitted that is the only reasonable rationale here.

company to initiate change in rates; deprives it of Section 4; produces a vacuum in the Act respecting this duty; and substitutes for it the Commission's duty under Section 5(a) which does not permit an increase in rates. This is an intolerable burden which the Commission clearly is not prepared to undertake.

As Congress wrote the Act, the natural gas company does not have capacity or power by private contract with its customers to prevent the comprehensive exclusive regulation provided by the Act; but as re-written by the decision below, the natural gas company may make contracts which for all practical purposes remove it from regulation under the Act. Examination discloses nothing in the climate of decisions under the Act congenial to cultivation of the notion that Congressional regulatory preemption declared in Section 1(a) of the Act to the area between the producer and the distributer was applicable only to those areas which the utility and its customer deigned to exclude from their private contractual arrangements. The very claim is repugnant to the manifest intent of the Act.

The effect of the decision, thus, is to hold that the regulatory authority under the Act is decimated with divisive islands above the regulatory level created by private contracts. Regulation is reduced from the uniform and monolithic "just and reasonable" of Section 4 applicable to all alike to piecemeal regulation of individual natural gas companies, insofar as they have operational activities free from private contracts. The natural gas company cannot initiate a 5(a) proceeding; the distribution company, assuming a contract, could not be expected to; and the consequent burden on the Commission to initiate a 5(a) proceeding would be overwhelming, if not impossible, when considered in the light of the volume of the Commission's statutory activities.[28]

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[28] The resultant confusion and futility which would result from displacement of the statutory scheme of regulation may be measured by the present

The holding below is in the teeth of the plain language of Section 4(d) that "no change shall be made *by any natural gas company* in any such *rate* * * * or *contract* relating thereto, *except* after thirty days' notice to the Commission *and to the public*." The 4(d) phrase "any such rate * * * or contract" clearly refers to the language in 4(c) which permits rates and charges "together with all contracts which in any manner affect or relate to such rates, charges" to be filed as rate schedules with the Commission. These two sections are governed by and inseparably connected with the Congressional declaration of public policy in Sections 4(a) and (b) requiring all rates to be "just and reasonable," rendering unlawful all rates not "just and reasonable," and insuring uniformity of "just and reasonable" by outlawing any differences, preferences, or advantages between localities or classes of service. Thus the Commission's administrative duty under the Act, and particularly Section 4, is statutorily confined to the ever recurring and continuing duty of "just and reasonable" prospectively; not to the sterile and negative determination of "unreasonableness" as the key to unlock performance of the duty enjoined by Congress upon the natural gas company and the Commission in Section 4. Yet the decision unnaturally subverts the statutory injunction, for while it admits that Section 4(e) "makes * * * plain" that in the 4(e) hearing the "dispositive question * * * is whether the increased rates are just and reasonable" (R. 143), it fails to recognize the unavoidable consequence, (i.e., establishment of the new rates if found just and reasonable) by the holding that contract existence denies the provisions of said Section to the Commission and the natural

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extension of the Commission's rate regulatory jurisdiction to independent producers. Commissioner Digby, in his dissent to the Commission's order No. 174-A issued on August 6, 1954, estimates as a minimum that the Commission would be required to consider 6,000 contracts. This in addition to the sales contracts under rate provisions of that order, and in addition to the normal jurisdiction of the Commission over transmission pipe line companies.

gas company. The blunt answer is that Congress did not so stipulate. The making of private contracts is influenced by numberless considerations, whether stated or intimate, which the parties thereto conceive will promote their own interests; yet the Commission, as the statutory agent of Congress, in permitting contract rates, or any other rates, to be filed and become effective can consider them solely from the "public interest" command of the statute (Section 1(a); Sections 4(a), (b), (d), (e)). Private considerations, however momentous to the parties, are irrelevant to the Commission's duty.

Only the natural gas company is authorized to initiate change in an existing rate. In fact, it is the duty of a natural gas company to propose such changes.[29]

Section 4(d) does not, as the decision below held, prohibit a change "until first" the Commission has a "proceeding" to destroy the current rate. It expressly contemplates change and modification in contract rates without a proceeding against current filed rates; for it forbids change by the natural gas company in "contract[s]" only where the thirty days' notice is not given. In other words, Section 4(d) expressly declares that "contracts" relating to rates shall be subject to change by the filing (and giving thirty days' notice) by the natural gas company. This notice is

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[29] The Supreme Court of Pennsylvania, dealing with provisions of the Public Service Company Law of 1913, which is substantially similar to Sections 4(d) and (e) of the Act, said in *Coplay Cement Manufacturing Company* v. *Public Service Commission* (1921) 271 Pa. 58, 114 Atl. 649, 651:

> "When a given rate, because of business conditions, becomes unfair, unjust, and unreasonable, the company has the power to demand fair, just, and reasonable rates. It initiates rates when the necessity here defined compels it; the wavering scale of reasonableness is the standard, and of it utility is the sole judge in the first instance, subject, of course, to what may later follow when the Commission's machinery is started."

See, also, *Pennsylvania Water & Power Company* v. *Consolidated G.E.L. Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 U.S. 906; *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.* (1951) 341 U.S. 246; *Hope Natural Gas Co.* v. *F. P. C.* (1943, 4 Cir.) 134 F. 2d 287; reversed on other grounds, 320 U.S. 591; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426; *United States* v. *Illinois Central Railway Co.* (1924) 263 U.S. 515.

required solely from the natural gas company, for Section 4(d) gives discretion to the Commission to permit change in rates and contracts without notice or hearing "for good cause shown." It is the only statutory notice to which Mobile was entitled from United. Had the Court below given this plain language the consideration it requires it would not have declared that Mobile's contract was being changed "without any statutory notice" (R. 144).

Mobile was required at its peril to obey the sanction of this notice for the provisions of the Act and the actions of the Commission thereunder respecting rates are equally binding upon it and United.[30] The Court below did not identify the "statutory notice" referred to, but there is no statutory notice defined or provided for by the Act as to change in rates or contracts affecting rates save that of Section 4(d), which here was admittedly given. The discretion to the Commission in Section 4(d) to "allow changes to take effect without requiring the thirty days' notice herein provided for * * *" is completely destructive of the Court's reasoning, for if Congress had intended that some notice outside the Act followed by a Section 5(a), or any other proceeding, were precondition to a change in "contract" relating to rates, surely it would not have vested its statutory administrative agent with power to permit change and destruction of "contract[s]" relating to rates without notice and hearing subject only to the statutory prescription "for good cause shown."

Instead the Court below proceeded in the teeth of Section 4(d) language to require rejection and dismissal of the filing and to order refunds — all prohibited by the

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[30] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company* (1951) 341 U.S. 246, affirming *Northwestern Public Service Company* v. *Montana-Dakota Utilities Co.* (1950, 8 Cir.) 181 F. 2d 19, 22; *Colorado Interstate Gas Co.* v. *F. P. C.* (1945) 324 U.S. 581, 597; *Hope Natural Gas Co.* v. *F. P. C.* (1943, 4 Cir.) 134 F. 2d 287, 311, reversed on other grounds 320 U.S. 591; *Woodrich* v. *Northern Pacific Railway Co.* (1934, 8 Cir.) 71 F. 2d 732; *Watab Paper Co.* v. *Northern Pacific Railway Co.* (1946, 8 Cir.) 154 F. 2d 436.

Act. The opinion reasoned: "To do otherwise would be an attempt by us to legislate judicially since the construction of Section 4(d) as contended for by the Commission and intervener is not warranted by the statutory language" (R. 154). But to reach the result declared, the Court below falls into the very judicial legislation it condemns, for there must be both deletion and addenda to Section 4(d) if the Act is to support such holding. The express direction for change or destruction of contracts relating to rates by the filing by the natural gas company followed by thirty days' notice, and the power to the Commission to permit such change without notice or hearing, must be deleted, and there must be added provisions affirmatively ordering the Commission to reject all filings by a natural gas company if there be contract rates until such time as a hearing is had to determine whether "on the facts such contracts are against the public interest." Further, there would have to be added other provisions affirmatively authorizing and ordering the Commission to require refunds. Thus as the dissent so cogently points out, the decision requires the Commission to take action contrary to the provisions of the Act, and requires it to exercise authority not expressly granted, which it may not do.[31]

How total is the war between the decision and Sections 4(d) and (e) is emphasized by the command to amend Paragraph (D) of the order of July 10, 1953 (R. 155) which, obeying the sanction of Sections 4(d) and (e), permitted the nonsuspendible resale industrial rates to become effective on July 25, 1953 (R. 69). Though Mobile originally sought such relief (R. 8, 13-16, 17-18) and was denied (R. 4-5), it did not so assert as a ground in its motion for rehearing (R. 38). Thus, by the express condition of Section 19(b), the Court below had no jurisdiction either to

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31 It is well settled that an administrative agency may exercise only those powers expressly granted to it by the basic act, nor may powers not granted be enlarged by the usurpation of a "decision". *Stark* v. *Wickard* (1944) 321 U.S. 288; *Waite* v. *Macy* (1918) 246 U.S. 606; *Arrow-Hart Co.* v. *Federal Trade Commission* (1934) 291 U.S. 587.

consider or to order as it did. *Federal Power Commission v. Colorado Interstate Gas Co.* (1955) 348 U.S. 492.

Furthermore, the actions of the Commission are concerned with its rate making powers under the Act and thus are quasi-legislative in nature. Thus these actions embrace a field into which the Courts cannot intrude, and in which they have no authority save the statutory review "limited to keeping the Commission within the bounds which Congress has created."[32]

Further confusion results from failure clearly to specify under what section of the Act the ordered hearing can be had. Obviously, not under Section 4, which gives discretion to the Commission whether there shall be a hearing; nor is the distributor-purchaser (sic, Mobile) one of the class authorized by Section 4(e) to complain and thus force choice of the administrative discretion whether to hear. The ordered rejection of filing removes possibility of a 4(e) hearing, for filing pursuant to 4(d) is essential to require the Commission to exercise its discretion. Clearly, Section 4(e) refers only to a hearing on proposed new rates after they are filed and gives no power over rates superseded by the proposed filing. Thus, Section 4(e) does not warrant the hearing which the holding required.

Mobile contended that Section 4(d) applies only to rate modifications already agreed to and suggested it was included to prevent the parties from changing filed rates by secret agreements. This is in the teeth of the language. The Supreme Court has held that Section 4 was the "heart" of the new regulatory system. Negation of secrecy was not the goal of Congress in taking over the *Attleboro* "gap" — it enveloped it with control, regulation and establishment

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[32] *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581. See, also, *Hope Natural Gas Co.* v. *F.P.C.* (1943, 4 Cir.) 134 F. 2d 287, 309, reversed on other grounds 320 U.S. 591; *Prentiss* v. *Atlantic Coastline Railway Co.* (1908) 211 U.S. 210; *B. & O. Railway Co.* v. *U. S.* (1924) 264 U.S. 258; *Home Telephone & Telegraph Co.* v. *Los Angeles* (1908) 211 U.S. 265; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1947, 5 Cir.) 163 F. 2d 388, cert. den. 332 U.S. 770.

of uniform rates of equal applicability. At the time of the Federal Trade Commission Report, agreements were freely made, but Section 1(a) is sufficient to show that Congress proposed to replace untamed contracts with the discipline of comprehensive regulation and control, both legislative and quasi-judicial. Secret agreements could not exist because any attempt to charge or collect or pay aught save at the filed, i. e., legal, rates would violate the Act and Commission regulations, thus subjecting both parties to the rigorous and destructive penalties of Section 21 of the Act. If Congress intended to fill the vacuum of the *Attleboro* "gap" and in doing so "meant to create a comprehensive scheme of regulation,"[33] it should not be held that it left a hiatus by denying Section 4 applicability where there was a private contract. Mobile's contention would cut out the "heart" and leave the Act without a life-giving circulatory system.

Section 5(a) is the watchdog and policeman of the Act. That Section requires a hearing on complaint that a filed and effective rate is "unjust, unreasonable, unduly discriminatory, or preferential * * *." If unreasonableness be found, the Commission is empowered to fix a just and reasonable rate thereafter to be charged, and to lower the rate thereto, with express denial of power to order an increase "unless such increase is in accordance with the new schedule filed by such natural gas company." This filing can only be had under Section 4(d). The natural gas company is not one of those authorized to initiate a 5(a) hearing by filing a complaint. It seems obvious that whether a contract should be set aside as prelude to rate regulation, as held below, is not within the competence of 5(a). The Act nowhere intends or contemplates such a hearing. Section 5(a) not authorizing a hearing as to whether a contract is against the public interest as prelude to a filing under 4(d), the

[33] Cf. *Public Utilities Commission v. United Fuel Gas Co.* (1943) 317 U.S. 456, 467.

Court holding the natural gas companies not permitted to file any increase because of a contract, and the Commission being expressly denied power in 5(a) to increase a rate: the decision below effectively and completely destroys right or power to change or increase rates which are provided for in contracts. This shelters the inequality condemned in Section 4(b).

Furthermore, it suggests the method of escape from the regulation contemplated by Congress, for Section 4, if a contract exists, is effectively repealed: the natural gas company cannot initiate 5(a); the distributor-purchaser to such a contract surely could not be expected to initiate a 5(a); the institution of hearing by the Commission at best would be tenuous due to the heavy mass of its duties otherwise under the Act: the result is the decision below opens the way to escape regulation by making contracts.

Thus it is that the existence of a contract under the decision below emasculates Section 4 and produces a void in the Act forbidding regulation. Congress did not intend this; nor does the Act so warrant, for Section 4 rightly read provides that contract rates constitute no impediment but are subject to change as any other rates. Choice of the *Commission's* discretion between contract or proposed rate, or any other rate level, is always embraced within the singleness of "just and reasonable." "Just and reasonable" involves an area from the lowest level (below which rates will not be just and reasonable because confiscatory) and the highest level above which unreasonableness would occur because too high, the plane selected being given to the exclusive discretion of the Commission.[34] United and Mobile alike are entitled to, and bound by that rate as just and reasonable only when that rate is made specific by Commission act.[35]

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[34] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246; *Cities Service Gas Co.* v. *F.P.C.* (1940, 10 Cir.) 155 F. 2d 694, 698-9, cert. den. 329 U.S. 773.

[35] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra.*

Thus contract filed rates may continue only so long as they occupy the plane selected by the Commission. No rate contract, fixed or otherwise, is rendered unimpeachable because "accepted" or "approved" by the Commission; nor does it thereby attain status not subject to change.[36]

Neither familiar concepts nor the original cost method, followed by the Commission, nor Sections 4 or 5 are based or dependent on "circumstances" or "inducements"[37] under which rate agreements are reached; rather there is involved the making of "pragmatic adjustments."[38] Clearly the

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36 *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 615.

37 The majority opinion refers to Mobile's contract as "recognized as late as July, 1952" (the date of the filing of increased rates) (R. 141); as an "existent unchanged approved contract" (R. 141) (Footnote 3); "the accepted contract" (R. 143). It is submitted these holdings are contrary to the record. In this respect Respondent's contract is precisely like that in *Tyler Gas Service Company* (R. 75-6) discussed in Footnote 3 (R. 141) of the opinion. The record shows that the particular supplemental contract relied on by Respondent was permitted to be filed by the Commission with this caveat:

> "Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended, nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the above designated rate schedule, *nor shall this order be deemed as recognition of any claimed contractual* right or obligation affecting or relating to such service or rate" (R. 57).

This is not acceptance, recognition or commitment to approval of the position Respondent claimed. Cf. *Hope Natural Gas Co.* v. *F.P.C.* (1952, 4 Cir.) 196 F. 2d 803, 806. It is express refusal and denial to so consider the contract, notifying Respondent that the contract is accepted only in respect of the rates presently effective. See *Mississippi River Fuel Co.* v. *F.P.C.* (1941, 8 Cir.) 121 F. 2d 159. The Act would be imported into the contract in any event, and thus the caveat plus the Act expressly was an acceptance of the contract subject to changes provided by the Act.

Too, pursuant to the Rules of the Commission (see p. 6-7, and Footnote 6, p. 5 herein) a statement was filed pursuant to the requirement of Section 154.85. This statement (R. 58-9) shows Supplement 10 to Supplement 7 completely eliminated with express Commission approval (R. 63, Par. (2); R. 64 Order (C)). Thus the current filed rates at the time Petitioner filed the application in G-2210 for increase were not those of the contract, but those of the conversion tariff. The majority opinion ignored these orders and their effect. Replacement of Mobile's contract with the conversion tariff is thus in precisely the same situation as that of *Tyler Gas Service Company*, which the majority opinion characterized as an "adversary" proceeding against the Tyler contract (R. 141, Fn. 3).

38 *F.P.C.* v. *Natural Gas Pipe Line Company* (1942) 315 U.S. 575, 586; *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 602.

Commission has been ordered to substitute the Court's judgment not only as to how the Commission may proceed to find "just and reasonable," but what is "just and reasonable," i. e., the rate, a holding squarely in conflict with the well settled rule that courts may not so substitute their judgment for the administrative decision, because that determination and decision is given exclusively to the Commission.[39]

The direction in this collateral proceeding to the Commission to recall its order in Docket G-2210 setting a 4(e) hearing[40] is equally in conflict with the well settled rule that an application for increased rates may not be dismissed without a hearing.[41] This not only requires the Commission to violate the Act but deprives United of rights guaranteed by the Act.

Further violence to the Act results from the attempted distinction of the *Tyler* case (Fn. 3, Op. R. 141). The Court below was without right to assume that all rates other than resale industrial would have a 4(e) suspension, for whether there shall be either suspension or refund requirement is discretionary with the Commission. Under the reasoning of the Court below, failure to suspend or require refunds would produce another "gap" in the Act identical with that resulting here. Furthermore, the distinction impliedly concedes lack of necessity for a contract hearing by the sug-

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[39] *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581; *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.* (1945) 325 U.S. 635; *F.P.C.* v. *Natural Gas Pipeline, supra; Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra.*

[40] The Commission's order of December 7, 1953, from which Mobile appealed, recites the hearing on the consolidated dockets, including Docket G-2210 (the 4(e) hearing on increase to Mobile) and G-1142, (the 5(a) proceeding involving all of United's rates) had then proceeded to the point where United had presented its direct case in support of the filing in Docket G-2210 (R. 4).

[41] *F.P.C.* v. *Natural Gas Pipe Line Company* (1942) 315 U.S. 575, 583; *Atchison, Topeka & Santa Fe* v. *U.S.* (1932) 284 U.S. 248, 262; *Ohio Bell Telephone Company* v. *Public Utilities Commission* (1937) 301 U.S. 292; *Morgan* v. *U.S.* (1936) 298 U.S. 468.

gestion that refund provisions of Section 4(e) are either adequate contract protection or equivalent to the hearing; but refund is not based on the superseded contract rates, it is the difference, if any, between the proposed new rates and those the Commission ultimately finds to be just and reasonable. Correctly considered, contract rates are nothing more than evidence relevant to Commission determination of the ultimate issue of just and reasonable, which determination is adequate protection procedurally and substantively to the "contract". That evidence of contract rates for Commission consideration in arriving at "just and reasonable" is sufficient guarantee to "contract rights" is conclusively shown by the language of 4(e), ignored by the majority opinion, which provides that after the 4(e) hearing "the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." This language gives the Commission all the powers it possesses under Section 5(a).[42]

The implied suggestion that suspension under 4(e) is equivalent to a 5(a) hearing distorts and is unsupported by the purpose and genesis of suspension.[43]

Examination of the report and debate on the Mann-Elkins Act (45 Cong. Rec., p. 3465-3472) shows that suspension was created to prevent effectiveness of new and increased rates pending Commission investigation of their reasonableness; not for the purpose of preserving a existing rate pending Commission determination of its unreasonableness. The right of initiation was considered to be a property right

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[42] *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 805; *State Corp. Commission of Kansas* v. *F.P.C.* (1954, 8 Cir.) 215 F. 2d 176, 183.

[43] Suspension provisions first arose in the Interstate Commerce Act, 49 U.S.C. 15(7) by virtue of the Mann-Elkins Act Amendment of June 18, 1910, Ch. 309, Sec. 12, 36 Stat. 552, amended to the present form by the Transportation Act of February 28, 1920 c. 91, Sec 418, 41 Stat. 386. Suspension provisions also were inserted as to bus carriers, etc. See 49 U.S.C.A. 316(g). The refund provisions in the Natural Gas Act, Sec. 4(e), 15 U.S.C. 717c(e) are similar to those in the Federal Power Act 16 U.S.C. Sec. 824(d)(e).

(p. 3472). It was thought preferable that rate initiation should be the burden of the Railroad (p. 3471) because the volume would be too great for the Commission to initiate. The effort was to achieve protection of the shipper without doing violence to the property right of the railroad to initiate and receive the rate because required for the proper operation of the business.[44] Thus in the Mann-Elkins Act Congress was seeking a balance between the property right of the carrier on the one hand and protection to the shipper pending opportunity of the administrative agency to *determine the reasonableness of* the proposed new rates. The power to suspend being discretionary with the administrative agency, the courts, under the doctrine of primary jurisdiction, concluded not to interfere, and thus was the balance preserved.[45]

Senator Elkins advised the Senate (p. 3470) that contracts for rates were subject to all of the terms of the Act, summing it up with the statement "What power or control could be stronger?"

In Section 5(a) of the Act, Congress carefully added to the governmental protectors of the public interest the "gas distributing company" as one authorized to file such complaint of unreasonableness against an existing rate. This selective handling demonstrates the impropriety of the decision below, for surely if, as adjudged, a contractee

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44 These hearings were considered in *Hope Natural Gas Co.* v. *F.P.C.* (1952, 4 Cir.) 196 F. 2d 803, where speaking of the course of the debates and particularly those on p. 3472 (45 Cong. Rec.), Judge Parker held that the suspension provisions of the Natural Gas Act were a "reasonable limitation upon the exercise of the property rights of the carrier", p. 809. Judge Parker also demonstrates that the suspension provisions of Section 4(e) were imported from the Mann-Elkins Act and quotes at length from Scharfman (The Interstate Commerce Commission Vol. 1, p. 201-2) upon the purport and effect of the period of suspension (p. 806-7).

45 See *Manhattan Transit* v. *U.S.* (1938, D.C. Mass.) 24 F.S. 174, 177; *B. & O. Railroad* v. *U. S.* (1910) 215 U.S. 481; *Board of Railroad Commissioners* v. *Great Northern Ry. Co.* (1930) 281 U.S. 412; *Kiser* v. *Central of Georgia Railway* (1916, D.C.S.D. Ga.) 236 F. 573, affirmed 239 F. 718; *Algoma Coal & Coke Co.* v. *U.S.* (1935 D.C.E.D. Va.) 11 F.S. 487; *Merchant Truckmen* v. *U.S.* (1936, D.C.S.D. N.Y.) 16 F.S. 998; *Caralson* v. *U.S.* (1952, D.C.S.D. N.Y.) 107 F.S. 398.

such as Mobile has a "common law" standing superior to "statutory regulation" until the brake of its "common law contract right" is released, the right under Section 4(e) to apply that brake to proposed rates effecting change in contract rates would have been statutorily specified.

Predicating the holding upon a statement made by the Congressman who introduced the amendment prohibiting suspension of industrial resale rates, the Court said that language applied only to "short-term contracts" (R. 152). No such condition appears in the language of the Act. Such legislative history may not be used to amend the statute. *Dameron v. Broadhead* (1953) 345 U.S. 322. Whatever the "Congressman who introduced the amendment" understood to be a "short-term contract", Congress did not see fit when it prohibited suspension to prohibit suspension only of short-term contracts. It prohibited any suspension of industrial rates. The decision does not indicate what constitutes a "short term."

No basis exists for the assumption, which the footnote on *Tyler's* case suggests, that Congress intended power under Section 4(e) to suspend rates other than industrial resale or to order refunds, should be in lieu of the hearing here ordered. If so, Congress then would have required suspension of rates for resale for industrial use only and made the suspension of Section 4(e) obligatory, not merely discretionary. Common law contracts for resale for industrial use have equal dignity at the law with domestic resale contracts. If the court intends a difference, additional insertion of addenda in 4(e) is immediately required. If there be no difference, then the court's reasoning does not merely emasculate Section 4, it strikes it down, because Section 4(e) then would contain an invalid and unreasonable classification. The court's reasoning gives no answer for the situation where the Commission elects not to suspend under Section 4(e). Apart from judicial review, this Court has made it abundantly clear that the Act is for the Commission

to administer, that the courts may not interfere with the Commission's exercise of that power nor substitute their judgment for that of the Commission.[46] Yet the Court below directs action contrary to the authority of the Act and requires issuance of orders contrary to the plain statutory provisions. This is not judicial review; it is legislative substitution of judicial judgment for adminstrative judgment which is exclusively vested in the Commission.[47] Thus in the context of the decision the requirement of a hearing upon the contract is in fact a judicially conceived suspension period applicable to new rates wherein the new rates themselves are not suspended but the right of application is suspended pending a hearing against the existing rates. This is suspension in reverse.

The Court below seeks to buttress its holding by declaring that a filing under Section 4(d) where a private contract exists is "unilateral" and thus to be forbidden. This identical contention was pressed upon the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (1954, 5 Cir.) 217 F. 2d 73, 78, but Chief Judge Hutcheson agreeing with the District Judge, rejected the contention as without merit upon the ground that compliance with Section 4(d) as a matter of law could not be "unilateral". If filing pursuant to direction of the statute be "unilateral", then Congress has stipulated for "unilateral" action.

Sections 4(d) and (e) of the Act were taken almost ver-

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[46] *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 617; *Montana-Dakota Utilities Company* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251; *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581, 589.

[47] From earliest times the courts consistently have said that statutory amendment by judicial construction violated the constitutional guarantee of separation of powers and have refused to approve such judicial amendment on the ground that "* * * it is the duty of judges to declare, and not to make, the law". *Fowler* v. *Lindsey* (1799) 1 L. Ed. 658; *Filene's Sons Co.* v. *Weed* (1918) 245 U.S. 597, 602; *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581; *Collins* v. *Hardyman* (1951) 341 U.S. 651 (saying: "It is not for this court to compete with Congress or attempt to replace it as the Nation's law-making body", p. 663); *U.S.* v. *Great Northern Railway Co.* (1952) 343 U.S. 562, 575.

batim from the Interstate Commerce Act and must be interpreted in the light of the Act, State statutes substantially similar to the Act and court decisions interpretative thereof under the applicable rule that "where provisions of one statute have been adopted by another, the interpretation which has been authoritatively placed upon the former applies to the latter also."[48]

In *Armour Packing Co.* v. *United States*, (1908) 209 U.S. 56, affirming (1907, 8 Cir.) 153 F. 1 this Court held that an ex parte filing of an increased rate under the Interstate Commerce Act which became effective without an administrative hearing was the only rate that could be charged and abrogated rates fixed by pre-existing contract. This decision was reached solely on the basis of Section 6(3), which is substantially similar to Section 4(d) of the Act, even though at the time of contract the Interstate Commerce Act gave no recourse to the Commission in the nature of either a 4(d) or a 5(a) proceeding under the Act to determine whether the rate so imposed was reasonable. Indeed, at the contract date the Interstate Commerce Act contained only a 4(d) character section; a comparable 5(a) Section was incorporated during pendency of the case; a comparable 4(e) Section was not introduced until after disposition in this Court.[49]

State and Federal courts have also held that rates filed ex parte under the provisions of State Public Utility Statutes, taken from the Interstate Commerce Act and containing provisions substantially similar to Sections 4(d) and (e) of the Act, were the only lawful rates which might be charged, and to the extent that rate provisions of any

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[48] *Hope Natural Gas Company* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 806, 807.

[49] Section 6(3) of the Interstate Commerce Act, included therein by original act of February 4, 1887, c. 109, 24 Stat. 381, is comparable to Section 4(d) of the Act; Section 15(7) added by act June 18, 1910, c. 309, §12, 36 Stat. 552, is comparable to Section 4(e); Section 15(1) added by act June 29, 1906, c. 3591, §4, 34 Stat. 589, is comparable to Section 5(a) of the Act.

existing contract between the utility and a consumer provided for a rate different from the rate so filed, such contract was void:

(a) New York:

North Hempstead v. *Public Service Corp.* (1921) 231 NY 442, 132 NE 144:

Provisions of the Public Service Commission Law substantially identical to Section 4(d) of the Act were imported by law into agreement between a gas distributor and the city, and were notice that the distributor was empowered to increase rates in the manner statutorily prescribed, notwithstanding the agreement and without prior determination of reasonableness. (Opinion by Judge Pound, Judge Cardoza concurring.)

Public Service Commission v. *Pavillion Natural Gas Company* (1921) 232 NY 146, 133 NE 427:

Under the same Act, gas distributor could increase maximum rates fixed by franchise granted prior to the effective date of the statute "by simply filing a schedule of rates with the Commission, notwithstanding a pending hearing on the reasonableness of prior rates."

(b) Missouri:

Kansas City Power & Light Co. v. *Midland Realty Co.* (1936) 338 Mo. 1141, 93 SW 2d 954, affirmed, *Midland Realty Co.* v. *Kansas City Power & Light Co.* (1937) 300 U.S. 109:

This case is strongly apposite and controlling here. The Court admitted it did "lend some support" (R. 145) but refused to apply it The parties contracted for specified rates for a firm period before the effective date of the regulatory statute. Utility filed ex parte with the Commission on June 28, 1917 for rates higher than the contract rates.

In September, 1917, users of steam heat service, not including Midland, filed a complaint against the rates which upon hearing the Commission found "unjust and unreasonable", and ordered a reduction which, however, remained above the contract rates. The ordered rates became effective March 1, 1918, and thereupon superseded the rates of the ex parte filing dated August 1, 1917. In June, 1918, the utility filed a proceeding claiming the second proceeding rates to be inadequate and confiscatory. In a third hearing the Commission allocated between heating and electrical service, which it had not done in the second hearing, and thereupon found the second proceeding rates unjust and too low, and ordered higher rates effective December, 1919. Suit was for the difference between the contract rates and the order of the second proceeding between March 1, 1918, and August 31, 1918, the date of expiration.

The Missouri statute is substantially similar to the Interstate Commerce Act, the Act here, and the statutes of Pennsylvania, Illinois and Arkansas considered herein. This Court held that the contract rates were superseded and replaced by the statutory rates. In denying the contention that contracts could not be so abrogated without a proper hearing, finding, and order of the Commission with respect thereto, this Court said that Midland

> " * * * does not, * * * reasonably could not, contend that immediate exertion * * * [of legislative] power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates. It is clear that as against * * * contract [rates] * * *, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature" (p. 114).[50]

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[50] To support this holding the Court (Fn. 9, p. 114) cites *Public Service Commission* v. *Pavilion Natural Gas Company* and *North Hempstead* v. *Public Service Commission* cited herein in subdivision (a) (p. 62):

The Court below and the Court of Appeals for the District of Colum-

(c) Pennsylvania:

The following decisions are under provisions of the Public Service Company Law of 1913 substantially the same as Sections 4(d) and (e) of the Act:

Suburban Water Co. v. *Borough of Oakmont* (1920) 268 Pa. 243, 110 A. 778:

"The filed rate, without administrative action, modifies or reforms pre-existing contract so that the filed rate replaces

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bia Circuit in *Sierra Pacific Power Co.* v. *Federal Power Commission* (1955), ... F. 2d ..., pending on certiorari Nos. 51, 53 this Term, in our submission, wholly misconceived the *Midland* case. Both courts say *Midland* involved a construction by the Supreme Court of Missouri upon a Missouri statute, and the Court below additionally suggests that the question was whether the Missouri statute violated the Federal Constitution, which it says was a problem not involved here.

The violation asserted allegedly arose from the holding by the Missouri Court that rates filed or established by the Commission (under Missouri statutes substantially similar to the Act), superseded and were superior to contract rates. The Missouri statute, this Court said, was to be "taken as if it declared that rates made in accordance with [statutory] provisions shall supersede all existing contract rates" (p. 113). For this statement it cited *Fulton* v. *Public Service Commission* (1918) 275 Mo. 67, 204 S.W. 386, and *State ex rel. Sedalia* v. *Public Service Commission* (1918) 275 Mo. 201, 204 S.W. 497, which cases were pressed upon both courts by Mobile and Sierra Pacific as rendering all private rate contracts void on the reasoning that the mere existence of a private rate contract constituted an unconstitutional impairment of the police power of Missouri. The Missouri cases do not so hold. In *Sedalia* the city gave a franchise to a city water company which set rates for hydrant rent. On complaint of the citizens of Sedalia the Missouri Commission required the water company to expand its facilities and for such improvements and extensions increased the rates. The city contended its ordinance was adopted pursuant to legislative delegation and was superior to the action of the Public Service Commission. The Missouri Court held that the Legislature could not delegate power to abridge its police power, for the Missouri Constitution forbade abridgement of that power. In holding that the Commission had the power to fix reasonable rates, irrespective of the contract, the Missouri Court did not proceed upon the theory or holding that the contract was void by its mere existence, as contended. It held that it was superseded by the act of the Public Service Commission in fixing rates whenever made, saying:

> "Under it [i.e. the Constitutional provision] no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rates. Under the Constitution and the Public Service Commission Act the Public Service Commission (supervised by the Courts as to the reasonableness of rates) is exercising the police power of the State by its delegated authority from the Legislature. Its rates therefore, constitutionally and legally, *supersede* any and all contract rates." (p. 499-500.)

that of the contract and becomes the only legal rate which may be charged.

Duquesne Light Company v. *Public Service Commission* (1922), 273 Pa. 287, 117 A. 63:

The Pennsylvania Supreme Court affirmed a reversal ordered by the Superior Court of a Commission rule in a 4(e) type hearing wherein the Commission held that a contract rate was valid against a 4(d) type filing, thus repudiating contention that the hearing and establishment of abrogation are a precondition to change and reaffirming that the rate filed in accordance with statutory prescription becomes the only rate chargeable.

Leiper v. *Baltimore & P. R. Co.* (1918) 269 Pa. 228, 105 A. 551:

Holds that filing of a rate increase has effect to abrogate pre-existing contract rates, for "[t]o permit the contract * * * to stand as against rates established * * * in conformity with the provisions of the law would be to nullify the purposes of the Act."

V. & S. Bottling Company v. *Mountain Gas Company* (1918) 261 Pa. 523, 104 A. 667, appeal dismissed 251 U.S. 544:

A contract rate held inoperative after the act became effective on the tariff filed.

(d) Arkansas:

Harrison Electric Co. v. *Citizens Ice & Storage Co.* (1921) 149 Ark. 502, 232 S.W. 932:

Held that the act of filing a rate schedule under statutory provisions identical in substance with Sections 4(d) and (e) of the Act was effective to supersede contract-fixed rates without prior administrative determination.

(e) Illinois:

Colton v. *Commonwealth Edison Co.* (1953) 349 Ill. App. 490, 111 N.E. 2d 363, 366:

This case was based on a utility statute similar to the Act. The Court held that injunctive relief by courts of equity would be denied where the Utilities Commission had permitted filed rates to go into effect without hearing, as the order could not be attacked collaterally but must be reviewed in the manner prescribed by statute, saying further:

> "* * * the Utilities Act superseded all common law remedies so far as rates are concerned; * * * the statutory remedies afforded consumers under the Act are exclusive; * * * the initiation of a rate is an attribute of management by a utility subject to the power of the Commission to change a rate if it finds it not just and reasonable; * * * the rate filed by a utility in accordance with the procedure prescribed by the Act is presumed to be lawful and must be complained of in the first instance before the Commission."

Antioch Milling Company v. *Public Service Company of Northern Illinois* (1954) 4 Ill. 2d 200, 123 N.E. 2d 302:

Under a statutory section like Sections 4(d) and (e) of the Act, the utility made an ex parte filing of rates which superseded a rate set by agreement under a rider, and filed a motion for the new rates to go into effect without suspension. The Commission record does not disclose what occurred at this hearing, but the motion was granted. Thereafter a complaint was filed against the new schedule of rates as unreasonable and discriminatory and attacking the propriety of the Commission permitting them to become effective. This complaint was dismissed. The Court affirmed the ex parte filing, and held the filed rates superseded the rider rates. It sustained the discretion of the

Commission to permit the new rates to become effective without suspension or hearing.[51] Comparability of the section of the Illinois statute to §15(7) of the Interstate Commerce Act (sic, Sec. 4(e)) was noted. Cf. Fn. 49, p. 61 herein.

2. The Decision Below Is In Conflict With Another Decision Of The Third Circuit, And With Decisions From Other Circuits.

The holding that contract provisions and rights are not subject but are superior to provisions of the Act and are controlling over the regulatory scheme until found to be against public interest in a proceeding brought for that purpose is clearly inconsistent with decisions from other circuits:

(a). The Fifth Circuit in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1945, 5 Cir.) 162 F. 2d 388, cert. den, 332 U.S. 770, held that a "favored nation" clause for a lower rate contained in a contract became "inoperative" after passage of the Act; that while Section 4 placed a "burden" on a natural gas company to file a new schedule,

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[51] Below Mobile, asserting that Supplement 10 to Supplement No. 7 was agreed upon to obtain new business from Ideal Cement Company, claimed the contract entitled to special consideration and protection. Holding a similar contention baseless in *Antioch*, the Court said:

> "The preferential rate here involved was introduced around 1911 with the aim of stimulating daytime consumption of power, which at that date was relatively slight. The recipient of the benefit of a preferential rate designed to increase off-peak demand has no cause for complaint if it is discontinued." (p. 307.)

The Court below suggests that the "long term" of Supplement No. 10 to Supplement No. 7 having been "accepted" by the Commission was somehow entrenched against change by the statutory scheme until it was first attacked and demolished. In *Antioch* the Supreme Court of Illinois said:

> "It is also argued that the long continuance of the rider creates a presumption that it was reasonable. We question whether this is so. Cf. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 31 S. Ct. 288, 55 L. Ed. 283, but the main point is that the issue before the commission was not the reasonableness of the former rate but the reasonableness of the new rate. Cf. *Produce Terminal Corp.* v. *Illinois Commerce Commission ex rel. Peoples Gas Light & Coke Co.* 414 Ill. 582, 597, 112 N.E. 2d 141."

Section 5 gave adequate remedy and right to the distribution company, by complaint, to have determined whether a rate was proper under the terms of the Act. No special proceeding against the contract was suggested. The Court declared that consideration of the enforcement of the contract provision would require it to invade the exclusive province of the Commission for rate making:

(b) *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipeline Company* (1949, 6 Cir.) 173 F. 2d 784, affirming (1948, D.C.E.D. Mich.) 80 F. S. 27. Michigan Consolidated had a contract with Panhandle Eastern for delivery of natural gas requirements up to 125,000,000 cubic feet per day. Panhandle was unable to make the contractual deliveries because of insufficiency of a compressor station. The Commission ordered operation to take care of all customers in Michigan and Ohio except the two largest customers, Michigan Consolidated and Michigan Gas Storage, and as to them ordered pro-ration of the balance. Michigan Consolidated did not seek a judicial review under Section 19(b) of the Act. Instead it sued in District Court (1) for specific performance to compel contractual delivery, and (2) for mandatory injunction to require Panhandle to operate the facilities so as to insure contractual delivery. The Court held that "* * * contracts entered into by private parties lose their force to the extent they conflict with orders or regulations of the Commission."

(c) In *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1941, 8 Cir.) 121 F. 2d 159, a contract filed as a rate schedule contained an escalation clause for increased rates to be effective after January 1, 1940. The Commission suspended application for the increased rate and, upon hearing, refused to approve the increased contract rate and continued in effect the pre-escalation contract rate. Mississippi appealed under Section 19(b), claiming priority and superiority to contract rate, but the Court held that the contract and its rates were subject to regulation

in the public interest and disposed of it in a 4(e) proceeding without requiring a special proceeding or one under 5(a).

(d) In *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (D.C.E.D. Texas, December 29, 1953) unreported (reproduced R. p. 73-81), affirmed (1954, 5 Cir.) 217 F. 2d 73, the facts and contentions of the parties were identical with those made by Mobile here save in one respect: the *Tyler* rates were rates for domestic resale and thus subject to suspension and were suspended, whereas the *Mobile* rates were for industrial resale only and so not subject to suspension. Tyler, by injunction, sought to declare contract rates superior to change under Section 4 until abrogated by the Commission under Section 5(a) of the Act. United moved to dismiss, because the suit sought "to enjoin compliance by the defendant with the provisions of the Natural Gas Act and more particularly with Section 4 thereof, and because it in effect bases its claim to declaratory and injunctory relief upon the theory and contention that the contracts relied on override and nullify the duties, powers, obligations and procedures imposed and conferred by the act on defendant as a natural gas company under the Act, indeed, override the provisions of the Act itself" (217 F. 2d 74).

Such contract rate superiority is Mobile's position. The gravamen of *Tyler's* case, as *Mobile's* was "that unless and until the contracts sued on are set aside for some invalidity or after a hearing before the Federal Power Commission, the contract rates are found by the commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with higher rates" (p. 76).

The District Court in *Tyler* said:

> "It is abundantly clear that United may not by private contract fix binding long-term future rates with

its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function." (R. 77);

that because United was charged "with a public interest" it "may not by private contract for future rates" collect a rate either "excessive, because * * * unfair to the consumer; neither may it bind itself to rates * * * determined to be confiscatory", because such "would jeopardize its ability properly to serve the public in the future" so that the rate making provisions of the contract as well as other provisions

"* * * are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with a governmental regulation or with public policy, the former must yield.

* * *

"So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable — and hence lawful — is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates." (R. 77-8.)

Chief Judge Hutcheson for that Court, in affirming such holding, stated:

"We find ourselves, on the contrary, in agreement with the well considered and expressed views of the

district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission."

So holding, he summed up the matter thus:

"Based upon these views, he thought, as we do, that the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act.

"So thinking, he rejected, as we reject, the plaintiff's view that the district court *could* and should grant the relief asked, (1) an injunction prohibiting United from proceeding under Section 4 of the Act, and (2) a decree in effect requiring it to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding." (p. 77-8.)

This clashes at all points with the holding below that Mobile's contract is superior to Section 4, so that neither United nor the Commission can lawfully enforce or comply with Section 4, nor the Commission regulate the contract rates until first it abrogates the contract as against public interest. Cf. *Pennsylvania Water & Power Co. v. F. P. C.*, (1952) 343 U.S. 414, 421-2, 423-4.

Below, Mobile contended that since there was a contract fixing rates, United's filing of new rates under Section 4(d) was "unilateral" and illegal; and that Court agreed, holding the Commission without power to receive the filing which it further held void. But the Fifth Circuit, rejecting the identical contention made by Tyler, expressly affirmed the District Court holding that such filing under

4(d) could not be "unilateral" saying that "the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme" (p. 78).

That the Fifth Circuit viewed Sections 4(d) and (e) as expressly providing for change of contract rates by the natural gas company clearly appears from the further holding that the trial court "correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the Court cannot do" (p. 78).

Thus, *Tyler* is squarely in collision with the decision below.

But Mobile (Opp. Br. p. 11) asserted the baseless claim that *Tyler* is inapposite because arising as a "collateral" proceeding. The short answer is that if, as held below, United's filing under Section 4(d) was void and the Commission without power to receive or permit such filing, it could be collaterally attacked anywhere for lack of jurisdiction and voidness under the classic bases permitting collateral attack.

In its Opposition Brief (p. 12) Mobile quoted the concluding paragraph from *Tyler*[52] upon the claim that Tyler

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[52] The last two paragraphs of the Fifth Circuit opinion in the *Tyler* case are as follows:

> "Finally, attaching to their supplemental brief a copy of the opinion of the Court of Appeals for the Third Circuit, in *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F. 2d 883, 892, appellants invoke as authority for their contention below and here, the majority opinion of that court holding that, under Section 4(d) of the Act 'the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates.'
>
> "Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastic, the dissenting member, is wrong, we think

was thus rendered inapposite to the decision below; but that paragraph must be read with the paragraph immediately preceding it which clearly shows that all the Fifth Circuit thereby intended was that no conflict existed with the decision here on the procedural question that the Commission was the correct forum for determination of the rights asserted. On the primary substantive questions as shown above, the Fifth Circuit was at categorical pains to frame the conflict it drew respecting the effect, rights, and duties of Section 4 upon private contract rates.

(e) The decision below is in square conflict with another decision of the Third Circuit, and thus presents an "intra-circuit conflict" of a type for which this Court has exercised review. *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 U.S. 507, 508; *John Hancock Insurance Co.* v. *Bartels,* (1939) 308 U.S. 180, 181.

In *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953, 3 Cir.) 202 F. 2d 899 (petition for cert. dism. 345 U.S. 988), the Commission acting as the Court below now orders, rejected and dismissed a filing under Section 4. There the Third Circuit reasoned that the "face" of Section 4 gave the Commission only two alternative choices: to allow the change to become effective by failure to act; or to enter upon a hearing and suspend for a maximum period of five months. Instead, reasoned the court, "It purported to follow a third course, rejection without hearing — a course for which it cannot show even color of statutory authority." Statements in the Court's opinion that the *Mis-*

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it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief.'; and that the plaintiffs did not show grounds for equitable relief." (p. 78.)

sissippi case is distinguished from this case are wholly inaccurate; the situation is precisely the same.[53]

The record here shows that neither the "until" clause nor the last proviso (italicized by the Court) has yet become applicable to Mobile's contract. The required statement (R. 58-59) filed by United shows that contract rate

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[53] The various grounds of distinction stated are clearly inaccurate. First, the plain language of Sec. 154.85 of the Commission's Rules is misconstrued. That part italicized by the Court is inapplicable to this record. The language which should have been italicized as applicable here provides that the filed contract

> "* * * shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules * * *"

and that of the first proviso:

> "That the natural gas company concurrent with the filing of the tariff shall submit, for insertion in each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules * * *"

(See Fn. 6, p. 5 herein.)

Second, the surprising statement in the course of consideration of Section 154.85 that "there is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate." (Opinion, Fn. 16, R. 153.)

United vigorously urged that the conversion tariff filed under requirement of Section 154.38(d)(3) (See Fn. 6, p. 5 herein) which prohibited percentage rate clauses and tax adjustment clauses; the statement (R. 58-59) filed pursuant to Section 154.85 showing complete elimination of Supplement 10 to Supplement 7; the Commission's order of August 1, 1952, in Docket G-2019 (R. 60) ordering the conversion tariff to be filed and become the effective filed rate schedule; followed by Mobile's failure to take an appeal under Section 19(b) of the Act: all conclusively showed the contract to be replaced and superseded by the conversion tariff and that such was *res judicata*, citing *Sunshine Anthracite Coal Company* v. *Atkins* (1940) 310 U.S. 381.

Third, the conclusion that "United's filing on June 24, 1953 did attempt to 'effect a change' in an unexpired contract without 'the execution of a form of service agreement contained in the tariff'", based upon the misconception of Section 154.85 is wholly incorrect. United's filing of increased rates on June 24, 1953 in Docket G-2210 did not purport to effect a change in a contract, for that contract had not, as such, existed as a "filed contract" since July 3, 1952, the date of filing of the conversion tariff in Docket G-2019 (R. 60) approved by the Commission. Further, Section 154.85 has nothing to do with filing changed rates under Section 4 of the Act. Finally, the execution of a form of service agreement contained in the tariff required in the last proviso of Section 154.85 applies, as expressly stated, only to a change or amendment of that part of the contract which the first part of the Section kept as an executed service agreement. Increased rates did not purport to change or amend that part of the contract left, for such remaining part did not set a rate.

Fourth, and most important of all, the suggestion that there is a difference factually and contract-wise between this and *Mississippi's* case is without basis. The record in that case shows *Mississippi* proposed a change in filed contract rates by a Section 4(d) filing (See Jt. App. p. 4a, 7a in No. 10868 in C.A. 3). The contract-conversion tariff situation between

provisions were not retained, thus could not have been the "existing filed contract" rate.

The Third Circuit then examined the dismissal and rejection of Mississippi's filing as being comparable to a motion to dismiss for failure to state a claim upon which relief could be granted, or motion for summary judgment, and concluded the rejection improper because "The statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures" (p. 902). It thereupon set aside the Commission's order on the ground that the dismissal was "wholly beyond the authority of the Commission." This conclusion was undoubtedly right, for the Commission, as the regulatory agent, is possessed only

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Mississippi River Fuel Corporation and its customer LaClede Gas Co. (202 F. 2d 904) was precisely identical to that here between United and Mobile. The public files and records of the Commission show: (1) *Mississippi* filed contract with LaClede dated October 2, 1947, which the Commission numbered as FPC Rate Schedule No. 26; (2) several amendments to the contract were filed prior to July 1, 1949; (3) on July 1, 1949, *Mississippi* filed its conversion tariff in compliance with Section 154.38(d)(3), also its statement pursuant to Section 154.85, which superseded the original contract; (4) the Commission permitted the conversion tariff to be filed. Thus, in 1953 when the Court below decided *Mississippi's* case the situation was precisely like that here. There is no doubt that the Court in *Mississippi's* case should judicially have known, and that this Court will take judicial knowledge and notice of these facts irrespective of whether they were a part of the record before that Court or not. See *Interstate Natural Gas Co.* v. *Southern Cal. Gas* (1953, 9 Cir.), 209 F. 2d 380 (Judicial notice "of records and reports of Administrative bodies" — contracts on file and orders in collateral proceedings); *Washington Gas & Light Co.* v. *Baker* (1951, D.C. Cir.) 195 F. 2d 29, 35 (application for rate increase filed since argument of the appeal); *Fletcher* v. *Jones* (1939, D.C. Cir.) 105 F. 2d 58, 61-2, and cases in Fn. 14, p. 61, cert. den. 308 U.S. 555 (Records and Reports of Home Owners Loan Board and Home Owners Loan Corporation, "even though formal proof thereof" not made below); *Colonial Air Lines, Inc.* v. *Janas* (1953, 2 Cir.) 202 F. 2d 914, Fn. 1 (Press release on action of CAB which court characterized "official action by a federal regulatory agency, not a part of the record below"); *NLRB* v. *Atkins & Co.* (1947) 331 U.S. 398, 406 (Circular of regulations not offered in evidence before the Board); *Savannah River Electric Co.* v. *Federal Power Commission* (1947, 4 Cir.) 164 F. 2d 408, 410 ("Public Records" including letters between executive branches of the Government, reports to Congress, Presidential Orders, contracts of Government agencies, most occurring after Commission action); *Greeson* v. *Imperial Irrigation District* (1932, 9 Cir.) 59 F. 2d 529, 531 ("Public Facts", "Geographical Positions", "Public Activities within Common Experience"); *Arizona* v. *California* (1931) 283 U.S. 423, 452 (Navigability of a part of the Colorado River); *Tucker* v. *Texas* (1946) 326 U.S. 517, 519;

Finally, the statement that in *Mississippi's* case the Court assumed Commission authority to reject a filing not conforming to its rules and

of those powers expressly granted by the Act and it possesses no inherent powers by virtue of its existence.[54]

But here the Court below under cover of the very procedures condemned as unavailable in *Mississippi* ordered refund of monies under the equitable doctrine of restitution. Aside from restitution the Court had no jurisdiction to so order because Mobile did not expressly reserve such a ground in its motion for rehearing: See p. 84-5 herein.

This gives added point to the dissent of Judge Hastie who spoke for the same Court in the *Mississippi* case. If the Third Circuit was right in *Mississippi*, it could not be right here. The opinion in *Mississippi*, when examined in the light of the Act and the cases above discussed, clearly demonstrate that that opinion was correct.

3. The Cases Relied On By The Court Below Do Not Support Its Decision.

The majority opinion principally relies on *Wichita Railway* v. *Public Utilities Commission* (1922) 260 U.S. 58, involving a Kansas statute and its application under Kansas law. This Court held that Section 13 of that statute fixed the *only* way in which a filed and effective rate could be

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citing Section 154.24. But the assumption was strictly limited to matters of form, i.e., "power to require schedules and supporting data to be organized or broken down into convenient and readily comprehensible form." (p. 902.) The Court then tested the assumption as well as the Commission action by comparing it to motions to dismiss for failure to state a claim, or motion for summary judgment, repudiating any power for summary rejection so comparable by rightly concluding that "the statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedure." (p. 902.)

Thus, Section 154.24 (Op. Fn. 17, R. 154) which was in existence and subject to judicial knowledge of the court at the time of such decision was not deemed grounds for affirming rejection nor does the opinion indicate the Commission so urged. Obviously this also applies only to form.

[54] *Stark* v. *Wickard* (1944) 321 U.S. 288, 309; *Federal Trade Commission* v. *Sinclair* (1923) 261 U.S. 463, 475-6; *Federal Communications Commission* v. *American Broadcasting Co.* (1954) 347 U.S. 284, 290; *Arrow-Hart & H. Electric Co.* v. *Federal Trade Commission* (1934) 291 U.S. 587, 598; *Montana-Dakota Utilities Co.* v. *Federal Power Commission* (1948, 8 Cir.) 169 F. 2d 392, 397, cert. den. 335 U.S. 853.

changed, set aside, fixed, determined, or substituted. Section 13 authorized the Commission "either upon complaint or upon its own initiative" to investigate and have "a full hearing" and "if then the Commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory, or unduly preferential" it shall "fix and order substitued therefor" just and reasonable rates. The Utility claimed Section 20 gave it power to change rates (comparable with that conferred by Section 4(d) of the Act), but this Court held that Section 20 gave no power to change or affect rates. It thus appears that the Kansas statute was in no manner comparable to the Act; nor did it contain any provisions comparable to Section 4 which expressly authorizes rate changes. In addition Section 13 authorized the Kansas Commission to fix and order rates substituted for filed and pending rates. Section 5(a) gives the Commission no such power. The Commission may lower, but not raise, rates; and if the adjudged just and reasonable rates be higher than the filed rates, such adjudged rates under Section 5(a) cannot become effective until the natural gas company files pursuant to Section 4(d).

This case is rather ruled by *Midland Realty Co.* v. *Kansas City Power & Light Company* (1937) 300 U.S. 109, which the Court below hurried by with the statement that it "does lend some support to the position of the Commission and the Intervener" (R. 145), but sought to distinguish on the ground that it was decision based upon a state court interpretation of a state statute which it conceded was precisely the situation in the *Wichita* case, though without explaining why it selected the latter for preference. The big difference is that the *Midland* case involves a statute which comes from the Interstate Commerce Act and contains provisions substantially similar to Sections 4(d) and (e) of the Natural Gas Act, whereas *Wichita* does not. This renders *Midland* controlling.

The analogy sought for *Federal Power Commission* v. *Niagara-Mohawk Power Corp.* (1954) 347 U.S. 239 is arti-

ficial and inapposite. No private contract was posed as preventing Federal regulation. That case involved conflict between rights claimed under license from the Federal Power Commission with rights claimed under conveyance from and title held under the State empowered to convey. This Court held that "Riparian water rights, like property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act." Footnote 18 (p. 413) shows that the Senate Committee reported the bill so framed as to secure and preserve the very rights claimed to be destroyed by the Federal enactment: Here Congressional intent is equally plain that the Act shall be superior to any and all rates reserved in contracts, and that no rate can be fixed, changed, filed, or charged except one filed by the natural gas company under Section 4, or found by the Commission in a 5(a) proceeding.

Hinkle Dry Goods Co. v. *Wichison Industrial Gas Co.* (1933, 10 Cir.) 64 F. 2d 881; *Kaul* v. *American Independent Telephone Co.* (1915) 95 Kan. 1, 147 Pac. 1130; and *Railroad* v. *Court of Industrial Relations* (1923) 113 Kan. 217, 214 Pac. 797, are all cases arising under the same Kansas statute involved in *Wichita* and are subject to the same distinction. The Act does not condition action or power of the natural gas company or the Commission under Section 4 upon such finding.

Attleboro Steam & Electric Co. v. *Narraganset Electric Lighting Co.* (1924, D.C.R.I.) 295 F. 895, is of a class with *Wichita*. While Section 48 of the Rhode Island statute contains language similar to Section 4(d) of the Act, the Court there followed the Supreme Court of Rhode Island in *Rivelli* v. *Providence Gas Co.* (1921) 44 R.I. 76, 115 A. 461, in holding that Section 21 deprived the Commission of Rhode Island of authority to accept or fix rates except after hearing and investigation in which it should find that the existing

rates are "unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of the provision of said Public Utilities Act." The District Court held that statute was not distinguishable from that before this Court in *Wichita's* case; and that therefore the ruling would be the same (p. 904). Manifestly that does not touch the situation here.

Arkansas Natural Gas Co. v. *Railroad Commission* (1923) 261 U.S. 379 furnishes no assistance to Mobile, for there the Arkansas statute expressly provided that the Railroad Commission "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities, or distributing companies, and such contracts shall not be affected by this Act or the Act of which this is an amendment" (p. 381).

The Natural Gas Act contains no such provision.

Southern Utilities Co. v. *Palatka* (1925) 268 U.S. 232, has no connection with the issues here. This case did not involve a regulatory statute or one claimed to control contract rates. The city granted franchise to the utility, specifying rates. The utility announced it would increase rates. The city sued to enjoin the increase over franchise rates; the defense, that franchise rates were so low as to deprive the utility of property without due process, was overruled, the utility refused further to plead; injunction was affirmed by the Supreme Court of Florida. This Court denied that such holding produced lack of mutuality. Lack of mutuality is without basis either at the law or in the contentions of the parties here.

Colorado Interstate Gas Co. v. *F. P. C.* (1944, 10 Cir.) 142 F. 2d 943, affirmed 324 U.S. 581, was a Section 5(a) proceeding instituted by the Commission on its own motion upon complaint of certain municipal and state regulatory bodies to determine whether filed rates were just and reasonable. There was not involved, as here, the question of whether a Section 4 filing superseded a contract rate. Section 5(a) expressly requires a hearing and finding of unjustness and unreasonableness. Obviously the fact must

appear from the evidence adduced, but Section 5(a) is addressed solely to a proceeding questioning whether a pending and approved rate then has become unjust and unreasonable. It has no relation to a rate change proposed under Section 4(d), nor to a hearing under Section 4(e) to determine whether the proposed rate change shall be approved, and established finally as "just and reasonable." Properly read, that portion quoted by the Court below, in the context of the issues for decision, declares that a filed and approved contract rate may be changed in a Section 5(a) proceeding only when the "fact" of unreasonableness is made to appear. This nowhere touches or involves the effect of a Section 4(d) filing upon a filed and pending contract rate. See that portion of the opinion under the heading "Abrogation of Prices fixed by contract prior to effective date of the Act" (p. 593) in which the Court held that exercise of regulatory power under the Commerce Clause could not be subordinated to arrangements previously effected, because entered into "necessarily" with "knowledge" of the paramount authority of regulation.

Probably Mobile in its brief will rely upon the decision of the District of Columbia Circuit in *Sierra Pacific Power Company* v. *Federal Power Commission, et al* (1955, D.C. Cir.) ... F. 2d ....[55] This case arose under the Federal Power Act (16 U.S.C. 824, et seq) which, except on one important point here involved (a) below, is almost identical with the Natural Gas Act. There are several differences between *Sierra* and this case which render *Sierra* inapposite here:

(a) The Act in Section 5(a) provides:

> "* * * or upon complaint of any State, municipality, State commission, or gas distributing company * * *" (App. p. 5).

The comparable section of the Power Act, Section 206(a), provides:

> "* * * or upon complaint, * * *" (App. p. 8).

[55] Pending on writ of certiorari Nos. 51, 53, this Term.

Thus where the Act restricts those competent to make a 5(a) complaint other than the Commission to "any State, municipality, State commission, or gas distributing company," the Power Act contains no restriction whatever. Thus a power company subject to the jurisdiction of the Power Act could under Section 206(a) file a complaint against its own filed and pending rate and secure hearing where the natural gas company cannot under Section 5(a) of the Act.

(b) The record, briefs, and opinion in the Court of Appeals show that the original contract between Sierra Pacific and Pacific Gas & Electric Company was entered into upon express permission of the California Commission first obtained upon the offered and ordered condition that no loss should be passed to other customers, and that if any loss resulted from the particular contract the stockholders of Pacific Gas & Electric Company should assume it. The California Commission a second time adjudged the continuing effectiveness of the condition. There is no indication that lack of jurisdiction of the California Commission to require and enforce the condition was raised, nor its validity attacked. No question apparently was made of the power of the California Commission by such condition to make an exception to the requirement of equal and uniform, just and reasonable rates to all consumers. No such circumstances exist here. The opinion does not disclose whether the Court was influenced by considerations of comity between the California State Commission jurisdiction and Federal jurisdiction in coming to its decision.

(c) The Court in *Sierra* fell into one of the like fundamental errors which embroiled the Court below; both seemed greatly influenced by "special circumstances", "inducements", "new business", and like situations which they considered resulted in an equity warranting protection. In fact, the Commission in *Sierra* admitted substantial evidence upon such special considerations surrounding the

inception and origin of the contract. The Commission and both courts should have refused admissibility and consideration to such claims upon the same grounds stated by the Georgia Court in *Union Dry Goods* v. *Georgia Public Service Corporation*, supra, affirmed by this Court, which held such considerations irrelevant and immaterial to the issue whether or not the proposed rates met the standards of the regulatory statute. Such questions of equity or hardship in any event address themselves to the Congress and not to the courts. (See p. 44-5 herein); Cf. *Antioch Milling Company* v. *Public Service Company* (1954) 123 N.E. 2d 302, 4 Ill. 2d 200.

(d) Citing *Montana-Dakota Utilities Company* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251, *Sierra* held the contract rate continued, saying it may be in the "area" of reasonable rates and so may the proposed rate, in which event the statute is not deprived of its efficacy to give effect to both rates until the contract rate be found unreasonable. But the cited case rejects such reasoning, for there this Court said that the reasonable rate was that rate which "shall be made specific only by exercise of the Commission's judgment in which there is some considerable element of discretion" (p. 251). *Sierra* not only deprives the Commission of the discretion and sole authority to select the "pinpoint" within the "area" which it shall establish as the "just and reasonable" rate, but the Court assumes to set the rate by directing the Commission to exonerate the contract rate until a special proceeding against the contract be had. This judicial invasion of the Commission's statutory power is also condemned by the cited *Montana* case, wherein this Court said that "no rate [may be claimed] as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, *and not even a court can authorize commerce in the commodity on other terms*" (p. 251). Then to make plain that such language applied to the exercise of judicial power, the Court said further that the right to the reasonable rate "is the right to the rate

which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable" (p. 251-2).

In invading the exclusive discretionary province of the Commission, the Court in *Sierra*, as in this case, is at war with the Act. The Fifth Circuit recognized that such action would constitute rate making where the courts had no such power in denying the relief requested in *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (1955, 5 Cir.) 217 F. 2d 73; and *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1947, 5 Cir.) 162 F. 2d 388, cert. den. 332 U.S. 770.

II.

The Act grants no authority to require refund of monies collected from change in rates for industrial resale only filed pursuant to Section 4(d) and not subject to suspension under Section 4(e).

The Court also concluded that all monies collected on the basis of the "erroneous order" were "unlawfully collected" and should be returned to Mobile.[56] In so holding the Court below is in conflict with the holdings of this Court and of the Fourth and Eighth Circuits, that under the Act the Commission has no power to make reparations, for its power to fix rates admittedly is limited to those "to be hereafter observed and enforced." *Federal Power Commission* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 618; *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company* (1951) 341 U.S. 246, 251; *Hope Natural Gas Company* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 805; *Hope Natural Gas Company* v. *Federal Power Commission* (1943, 4 Cir.) 134 F. 2d 287, 311, reversed on other grounds 320 U.S. 591; *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company* (1907) 204

[56] Second question presented.

U.S. 426, 439; *State Corporation Commission of Kansas* v. *Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, 183.

What was said in *Arrow-Hart Company* v. *Federal Trade Commission* (1934) 291 U.S. 587, is apropos here. The Federal Trade Commission issued a cease and desist order requiring tranfer of certain shares of stock on the ground that the ownership of the stock which brought two competing companies under single control was a violation of the Clayton Act. The question was the power of the Commission to issue the order. The Court said:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of, but if accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed on the theory that this is necessary to render effective the prescribed statutory remedy." (p. 598-9.)

As noted, the Commission having no express power in the Act, possesses "no additional powers of a court of equity" to order refunds or reparations denominated restitution. The Court below is equally without power to so order and thus enlarge the Commission's original or its judicial review powers under the Act; indirectly to accomplish a result the basic Act prohibits.

Too, the Court below fundamentally lacked power to make the order, because the point as ruled was not reserved by Mobile in its petition for rehearing to the Commission. *Federal Power Commission* v. *Colorado Interstate Gas Company* (1955) 348 U.S. 492; Section 19, Natural Gas Act. Mobile's motion for rehearing contended that the Commission, having accepted United's filing under Section 4(d), had the power under Section 4(e), and should have ordered that all monies collected pursuant thereto should, upon

conclusion of the hearing, be ordered refunded if the whole, or any part, should be found to be unjust, unreasonable, or unlawful (I(c) R. 39; Section B, R. 43-4). The contention had nothing whatever to do with refunds in the contingency held by the Court below, i.e., unlawful collections on an illegal filing which the Commission had no power to receive. Indeed, in its original pleading, Mobile expressly admitted the Commission "had a right" to order the hearing (Pa. 10, R. 11). The Court noting Mobile's contention, said:

> "Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies *collected after the acceptance of such filing* be held subject to refund." (R. 154.)

Instead, the Court, sua sponte, held the filing void for want of Commission power to receive it, and asserted power under familar equitable principles to brand such collections illegal, and order them refunded. Its powers of review not being invoked by preservation of the point in the motion for rehearing under Section 19 of the Act, the Court was without any jurisdiction to consider or act upon the principle asserted. *Federal Power Commission v. Colorado Interstate Gas Co., supra.*

Clearly Section 4(e), as to rates subject to suspension, authorizes the Commission in its discretion to require a bond for refund should the increase not be allowed. With equal clarity Section 4(e) denies to the Commission power to order suspension or refund of monies collected pursuant to filed proposed rates for the sale of gas for resale for industrial use only. That Section provides "That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; * * *" though of course it does have power under Section 4(e), if it orders a hearing, to reduce the proposed rate not subject to suspension to the extent it finds the increase unjustifiable.

Section 4(e) grants power to the Commission to order refund only as to rates subject to suspension. In ordering a refund under the circumstances here, the Court below goes entirely outside the Act and requires the Commission to follow after. The rationale of its opinion in *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953, 3 Cir.) 202 F. 2d 899 (petition for cert. dism. 345 U.S. 988), was that the Commission's authority and power were limited to those powers granted in the Act. After discussion and analysis, it concluded that familiar judicial concepts furnished no basis for Commission exercise of analogous judicial authority because the statute "which defines the power of the Commission in natural gas matters makes no provision for any such procedures" (p. 902). Yet here the Court bases its decision on the very analogy of judicial concept which it rejected in *Mississippi*. Thus this decision furnishes another instance of intra-circuit conflict.

The Commission is possessed only of power delegated to it by the basic Act, and has no power that is inherent by virtue of its existence (See Fn. 54, p. 76). It follows that the Court below is without authority to order exercise of a power not delegated—i. e., power to order refund under judicial concepts of equitable restitution. In *State Corporation Commission of Kansas* v. *Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, in a per curiam opinion the governing principle is there stated:

> "It is pointed out that in rate regulations such as is here involved, the Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks power to grant reparation where a rate has proved on application to be confiscatory. The Court also is limited strictly to the exercise of judicial power and has no power to fix rates or to accord reparation on account of insufficiency of rates in the past. In the process of rate regulation, therefore, the utility must propose a change in the rates under which it is operating and the Commission allows or disallows the change. It is the allowance or disallowance that is subject to

review by the Court. There is no place in the proceeding for either the Commission or the court to accord reparation" (p. 184).

Whether the increased rates for resale for industrial use only proposed as to Mobile were just and reasonable and were to be allowed is by the Act solely confided to the discretionary judgment of the Commission. Thus the Court by this order invades the discretionary jurisdiction of the Commission, fixes and establishes the rate at the contract level, rejects any increase and orders refund of monies collected from the filed rate. Courts may not substitute their judgment and discretion for matters submitted to the discretion of the Commission.[57]

Judicial review under Section 19(b) of the Act does not give the courts power to order the Commission to take action not granted by the basic Act, for their power on such review is limited to the determination of the correctness by the Commission of the exercise of the powers expressly granted and to keep the Commission within the ambit of the basic Act. Thus the Court by such holding over-stepped the permissible bounds of judicial action.

The holding is not justified by the cases of *B. & O. R. Co.* v. *United States* (1929) 279 U.S. 781, and *Arkadelphia Company* v. *St. Louis S. W. Railway Co.* (1919) 249 U.S. 133, which the Court cites. Those cases merely state and apply the age-old rule that where one has lost by the enforcement of a court judgment subsquently reversed, he is equitably entitled to restitution, and so far as discretion deems

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[57] *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 320 U.S. 581; *FPC* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.* (1945) 325 U.S. 635; *F.P.C.* v. *Natural Gas Pipeline, supra*; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra*; *Algoma Coal & Coke Co.* v. *U.S.* (D.C. Va. 1935) 11 F. Supp. 487; *Carlson* v. *U.S. et al* (D.C.N.Y. 1952) 107 F. Supp. 398; *Merchant Truckmen's Bureau of New York* v. *U.S.* (D.C. N.Y. 1936) 16 F. Supp. 998; *Manhattan Transit Co.* v. *U.S.* (D.C. Mass. 1938) 24 F. Supp. 174; *Board of Railroad Commissioners* v. *Great Northern Ry. Co.* (1930) 281 U.S. 412.

justifiable to have corrected what had been wrongfully done.[58] This doctrine is applicable only to court judgments, not to orders of an administrative agency.

Federal Power Commission v. *Interstate Natural Gas Company*, (1948) 336 U.S. 577, 582, illustrates this. The question arose over a fund accumulated under a stay order issued by the Fifth Circuit against an order of the Federal Power Commission, and this Court said:

> "It is the responsibility of the *court* which distributes the fund accumulated under *its* stay *order* 'to correct that which has been wrongfully done by virtue of its process'. United States v. Morgan, 307 U.S. 183, 197, 83 L. Ed. 1211, 1220, 59 S. Ct. 795."

Thus, the doctrine was applied in accordance with its judicial history to the Court order.

Both *Baltimore* and *Arkadelphia* were court proceedings. The Baltimore suit was one under the Urgent Deficiencies Act.[59] The suit, then, was a plenary suit in an equity court. The court dismissed the bill for want of equity and was reversed, 277 U.S. 291. Upon the coming down of the mandate and in accordance with the directions of this Court, the District Court considered the question of restitution. After hearing, it denied the application for restitution and

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[58] This rule is fully discussed and stated to the same extent from earliest times. Cf. *United States Bank* v. *Bank of Washington* (1832) 8 L. Ed. 299; *U. S.* v. *Morgan* (1939) 307 U.S. 183; *Atlantic Coastline R.R. Co.* v. *Florida* (1935) 295 U.S. 301; *Federal Power Commission* v. *Interstate Natural Gas Co.* (1948) 336 U.S. 577.

[59] The Urgent Deficiencies Act, 38 Stat. 219, 28 U.S.C. Sec. 47, originated in the dispositions made by Congress in 1913 for transfer to and vesting in the district court of the powers of the abolished Commerce Court, 39 Stat. at 219. As carried into the old 28 U.S.C. Sec. 47, the statute is explained as intended to expedite injunctive relief for irreparable damage. *Louisville & N. R. Co.* v. *U.S.* (1915) 238 U.S. 1; *Texas Electric Railway Co.* v. *Eastus* (1938 D.C. Tex.) 25 F. Supp. 825, affirmed 308 U.S. 512; rehearing denied 637; *Scripps-Howard Radio* v. *Federal Communications Commission* (1942) 316 U.S. 4. (See at the present time 47 U.S.C. Sec. 402(a) relating to the Federal Communications Commission.) In substance, the jurisdiction transferred to the district court from the Commerce Court by the Urgent Deficiencies Act of 1913 is that of the general equity powers of a district court.

appeal was again taken. As a result of the "erroneous refusal" of the District Court to set aside an order of the Interstate Commerce Commission, the Supreme Court held that the litigants were required to pay monies they otherwise would not have been required to pay and restitution was ordered. The restitution, however, arose from the order of the District Court, not from the order of the Interstate Commerce Commission.

Equally in *Arkadelphia Milling Co.*, suit was a plenary one in equity seeking to enjoin an order of the State Railroad Commission of the State of Arkansas. Temporary injunctions were issued and plaintiff was required to execute a bond "conditioned that plaintiff should keep a correct account respecting its carriage of passengers and freight showing the difference between the tariff actually charged and that which would have been charged had the rate inhibited been applied * * * and the names of the persons affected as far as practicable" (p. 138). Upon reversal the District Court moved to correct the injury which had arisen *by its order*, so both cases cited by the Court below are in the traditional bounds of the restitution principle.

The mere statement of such circumstances destroys their applicability here. Mobile paid no monies pursuant to a court order; nor pursuant to an order of the Commission, but by direction of the Act itself; for these rates being for the sale of natural gas for resale for industrial use only, the Commission had no choice under Sections 4(d) and (e) of the Act save to permit the rates to go into effect at the end of the 30-day period provided for in Section 4(d). The Commission order admitting United's filing and making it effective is not a judgment; it is the simple memorandum of the performance of a mandatory act required by the explicit and unambiguous terms of Sections 4(d) and (e) of the Act, subject, of course, to the justification of said rates by United in the hearing ordered under Section 4(e). The collections were not enabled or authorized by the Commission order, certainly not by a court order; rather, it is

the Act which is vital, not the documental record of its invocation.

Restitution is a way whereby courts may remedy and rectify their own mistakes; not a procedure whereby courts may remedy or rectify mistakes assertedly made by other constitutional bodies. The Court below did not seek to remedy or rectify a mistake of its judgment, for no monies were paid under the compulsion of its judgment. It sought to remedy what it held to be an invalid exercise of discretionary statutory regulatory power by the Commission. Section 4(d) of the Act gives the Commission two discretionary options: (1) To permit the new filing to become effective in less than 30 days, or (2) for "good-cause shown" to permit the filing to become effective "without requiring the 30 days notice". Section 4(e) also vests the Commission with certain discretionary options upon a filing pursuant to Section 4(d): (1) upon complaint of any State, municipality, or state commission, or upon its own motion it can enter upon a hearing: (2) it "may" suspend the filing during the course of such hearing, but not for a longer period than five months beyond the expiration of the 30 days provided for in Section 4(d), after which it shall go into effect upon motion made; (3) if the hearing be not concluded and if the rates filed pursuant to Section 4(d) are subject to suspension, the Commission "may" require a bond against possibility of refund if the filing be not wholly approved.

In respect of non-suspendible rates for industrial resale only, the discretionary options given the Commission are the options above defined for Section 4(d) only; for while it may hold a hearing under Section 4(e), it cannot prevent their becoming effective at the end of the 30-day period stipulated by Section 4(d).

All of the foregoing options are addressed to the exercise of quasi-legislative functions by the Commission so that even if it be assumed, for argument, that the mandatory order permitting the industrial rates to become effective at the end of 30 days was erroneous, it was an error in the

quasi-legislative field and not the mistake of a judicial body vested with traditional, historical, and inherent equitable powers necessary to the exercise of the doctrine of restitution.[60] Elsewhere we have shown that it is elementary that administrative bodies derive their powers solely and strictly from statute and do not possess either the broad or inherent powers of courts. Administrative powers are strictly construed. Administrative agencies do not command the free range of judgment enjoyed by Federal courts. The restitution power is one clearly judicial in nature, designed to correct injury suffered from judicial process. The attempt to extend its application into a field where it has no historical or logical basis is simply an encroachment upon the legislative field in violation of the separation of powers.

Research has produced no instance where a federal court under comparable circumstances directed an administrative agency to require restitution for money collected as result of an administrative order the Court held erroneously issued. Congress having initially denied the Commission power under the Act to order reparations, courts cannot award reparations by the simple expediency of adjudicating as "void" a mandatory order, labelling the ordered reparations "restitution of monies unlawfully collected", and thus achieve powers directly denied by the statute. Irrespective of the order, the monies were paid by the direction of the statute. The decision below invades and trespasses upon territory forbidden to the courts by the pronouncement in *Montana Dakota Utilities Co.* v. *Northwestern Public Service Company, supra,* that:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate,

[60] See p. 84, 86-8 herein; Fn. 58, p. 88.

whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in commodity or other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable." (p. 251-2.)

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the judgment of the Commission should be affirmed.

Respectfully submitted,

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION
AND FEDERAL POWER COMMISSION,
Respondents.

APPENDIX TO PETITIONER'S BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITIONER'S BRIEF

Excerpts from Natural Gas Act

[PUBLIC — No. 688 — 75TH CONGRESS]
[CHAPTER 556 — 3D SESSION]
[H. R. 6586]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution

83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. § 717 (1946).]

* * * * *

RATES AND CHARGES; SCHEDULES; SUSPENSIONS OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue

preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation, or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of

any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge

is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

* * * * *

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in

part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

GENERAL PENALTIES

SEC. 21. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall,

upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. [52 Stat. 833 (1938); 15 U. S. C. 717t (1946)]

* * * * *

Excerpts from The Federal Power Act

49 Stat. 852, 16 U. S. C. 824e, Provides in part:

SECTION 206:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

Opinion of Trial Court

In

UNION DRY GOODS COMPANY, v. GEORGIA PUBLIC SERVICE CORP.	No. 9, July Term, 1914. Bibb Superior Court. Injunction.

Judgment and Opinion of Court

The plaintiff seeks to prevent the defendant, a public service corporation, from refusing to furnish electric current, as it has been doing under a contract executed on July 18th, 1912, and from treating this contract as abrogated, alleging that the defendant is demanding increased rates for its service and is threatening to cut off its current and refuse its electric service to plaintiff to its irreparable damage, unless plaintiff will pay rates in excess of the rates agreed to in the said contract.

The defendant in answer to the plaintiff's petition admits the original contract and admits that it is now demanding increased rates, though the time for which said contract was made has not expired, but defends its rights to make demand for increased rates by setting up an order and judgment of the Georgia Railroad Commission that the contract in question, and all similar contracts made by the defendant, be abrogated, and fixing maximum rates by which defendant shall be governed in its charges to the public.

Upon the hearing the order and judgment of the Railroad Commission were put in evidence and it was admitted and proved that the rates complained of in this case were not in excess of the maximum rates fixed in its order by the Railroad Commission to be charged by the defendant corporation for electric current furnished to its consumers.

The plaintiff concedes that if the Railroad Commission has power and authority to fix rates at which electricity

may be furnished by Companies and Corporations engaged in manufacturing and transmitting this useful agency, and to adjudicate contracts already made to be discriminatory, and to order them abrogated, though thereby the consumer will be injured and the electric company benefited, then the defendant has the right and power, under the orders of the Commission passed in this case, to treat the contract of July, 1912, as abrogated, as of March 1st, 1914. In other words, the plaintiff concedes that unless the order of the Railroad Commission be treated by the Court as void and of no effect, in so far as it orders this contract, and all others similar thereto to be abrogated, it is impossible for this court grant the prayers of the petition.

The petition, therefore, attacks the act of 1907 by which the General Assembly undertook to extend the powers of the Railroad Commission so as to take in the control of electric light and power companies, telegraph and telephone companies, street railroad companies, and other public service companies enumerated in said act. It denies the constitutionality of this act. It also denies that the act, can if constitutional, confer upon the commission the right to regulate rates, and prevent discriminating rates. It also specially denies the power of the Commission to abrogate a contract already legally made, between a Light and Power Company and a consumer, alleging that such power impairs the obligation of a contract, and virtually is an ex-post facto law as to contracts.

Upon careful consideration of the contract in question the order of the Railroad Commission, in Re, "Application of Georgia Public Service Corporation for increase in commercial and residence and retail power rates"; — and of the adjudication of the Supreme Court as to the jurisdiction and power of the Railroad Commission; after full and able argument by counsel, for both the plaintiff and the defendant, — I do not think that there is any doubt as to the power of the Commission to fix and regulate rates for the

Georgia Public Service Corporation, and to require these rates to be uniform. The most serious question was whether a legal contract could be set aside even by the Commission, with all its broad powers. This question, however, is resolved by the principle repeatedly adjudicated, that such a contract was made, subject to the law, then in existence, giving the Commission penary power to fix rates and to prevent discrimination, — this having been specially conferred upon the Commission long prior to the contract of July, 1912; and that both parties contracted subject to the public law conferring this absolute power upon the Commission.

Recent decisions of the Supreme Court of this State, as well as the uniform trend of judicial opinions in construing statutes creating Railroad and Public Service Commissions, seem to leave no doubt as to the power of the Commission, at the instance of the consumer, or of the Power Company, or of its own initiative, to fix and regulate rates, and no doubt is left that not only is the Power Company bound by the rulings of the Commission as to maximum rates, but also as to discriminatory rates, and, of course, the consumer of light or power current must yield to the same authority when it condemns any contract, either in contemplation, or in actual existence, as discriminatory, and so against public policy.

It is therefore considered and adjudged that the injunction prayed for be denied and the restraining order be dissolved. This April 20, 1914.

H. A. Matthews, J.S.C.M.C.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office,

Atlanta, July 11, 1955.

I hereby certify that the foregoing three (3) pages hereto attached contain a true and complete copy of the Judgment and Opinion of the trial court, in Supreme Court Case No. 11535, *Union Dry Goods Company* v. *Georgia Public Service Corporation*, as appears from the record of file in this case in this court.

WITNESS my signature and the seal of this court hereto affixed the day and year above written.

/s/ HENRY H. COBB
Deputy Clerk
Supreme Court of Georgia.

[SEAL]

OPINION OF
RAILROAD COMMISSION OF GEORGIA

(Now known as Georgia Public Service Commission)

FILE NO. 10978

By Candler, Chairman:

In Re

Application of Macon Railway and Light Company, Macon, Ga.
For increase in commercial and residence light and in retail power rates.

Under an ordinance of the city of Macon, passed in 1902, the Macon Railway and Light Company, as a result of a consolidation or merging of the Macon Consolidated Street Railway Company; the Macon Electric Light and Railway Company, and the Metropolitan Street Railway Company, became possessed of franchise rights to operate street railway lines, and electric lighting and power lines in that city. Among other things this franchise provided that at no time during its existence, should a fare exceeding five cents for a continuous ride within four miles from the city hall, be charged by said company, and also that beginning January 1st, 1914, and for ten years thereafter, a tax of one per centum "of the gross receipts of the earnings of said company from any and all sources" should be paid to the city, which said tax should be in lieu of all license, occupation or special taxes, but not of ad valorem taxes, or paving or similar assessments.

Under this franchise the railway and light company undertook to furnish to the public transportation on its car lines, and electric current for lighting and power purposes.

Prior to March 1st, 1913, the rate in effect for commercial and residence lighting was 12 cents per K. W. H., with discounts for payment of bills by the 10th of the succeeding month ranging from ten to sixty per cent. according to the monthly consumption, with a minimum charge of $1.50 per month for each meter connected. The rate for power was 10 cents per K. W. H., with the same discounts as given on commercial and residence lighting, plus a service charge varying from eighty cents to one dollar per month per H. P.

Anticipating severe competition for business upon the completion of a steam plant by the Georgia Public Service Corporation about March 1st, 1913, effective March 1st, 1913, the railway and light company put into effect for commercial lighting and power a rate of 10 cents per K. W. H. with discounts according to monthly consumption and for prompt payment, ranging from sixty to eighty per cent., with a minimum charge of $1.00 per month, and for residence lighting the same rate with discounts ranging from thirty to forty per cent. and a minimum charge of fifty cents per month. Under these rates commercial lighting and power current was furnished at from 4.05 cents net down to 2.02 cents net per K. W. H., and residence lighting current for from 6.75 cents down to 5.85 cents net per K. W. H.

Alleging that the last named scale of rates, now in effect, is non-compensatory and ruinously low, the company petitions the Commission for authority to increase its commercial and residence lighting and its power rates, to the following:

Commercial and Residence Lighting.

(Gross, subject to discount of 10 per cent. for payment within 10 days after due date).

			Gross	Net
First	50	K. W. H. or less per month....	11.1¢	10¢
Next	50	" " "	10	9
Next	100	" " "	9	8.1
Next	100	" " "	8	7.2
Next	100	" " "	7	6.3
Next	100	" " "	6	5.4
Next	1500	" " "	5	4.5
Next	1500	" " "	4	3.6
Next	2500	" " "	3	2.7
Next	4000	" " "	2.5	2.25

Minimum monthly charge $1.00 net per meter installed.

Retail Power Service.

			Gross	Net
First	50	K. W. H., or less, per month	6¢	5.4¢
Next	50	" " "	5	4.5
Next	300	" " "	4	3.6
Next	600	" " "	3	2.7
Next	1500	" " "	2.5	2.25
Next	2500	" " "	2	1.8
All over	5000	" " "	1.8	1.62

Minimum monthly charge $1.00 per K. W. of maximum demand based on 60 per cent. of K. W. connected load, but in no case less than $1.00 per month for each meter installed.

Between March 1st, 1913, when the reduced rates became effective and October, 1913, during the active competition for business between the petitioner and the Georgia Public

Service Corporation, each entered into contracts with numerous commercial light and power consumers covering long periods of time, some as long as five years.

The Mayor and Council of the city of Macon, several consumers holding contracts covering long periods and numerous citizens have entered appearances and oppose the grant of the increased scale of rates prayed for.

Petitioner and protestants have been fully heard by the Commission.

In order that a clear understanding of the contentions of the respective parties and the rulings of the Commission thereon may be obtained, brief reference should be made to conditions in Macon with regard to public lighting, power and transportation as they are to-day, and of the events productive of these conditions.

The Macon Railway and Light Company was incorporated in October, 1902, and as already stated, was a consolidation of all the electric railway, electric lighting and power companies operating in Macon and its suburbs. Under the franchise ordinance first mentioned the consolidation was expressly approved by the city. The franchise was accepted and the petitioner has since been continuously operating thereunder. It owned and now owns a centrally located steam power station, with a generating capacity of 3000 electrical horse power, sufficient to supply the present needs of the city. The company was originally capitalized with $900,000.00 of common stock, $300,000.00 of preferred stock and $1,000,000.00 of mortgage bonds. It is in the record, undisputed, that the original properties of the company were purchased from the proceeds of the bonds; that the proceeds from preferred stock were expended in subsequent improvements, betterments and additions, and that the $900,000.00 of common stock does not represent any actual capital contributed. The capitalization stands to-day as originally issued. Since its organization the company has earned and paid yearly its fixed

charges, and six per cent. on its preferred stock; and in 1910 and 1911, four and one-half per cent., and in 1912, seven per cent. on its common stock, besides accumulating a surplus of about $450,000.00, in the 10 years ending with 1912.

Some six or seven years since, W. J. Massee and A. B. Leach and Company purchased the control of the company, and W. J. Massee became its president, continuing so for about five years.

The Macon Gas Company was organized in 1852 and controls the entire gas industry in Macon. Its controlling stock was acquired some years ago, and is now controlled by A. B. Leach & Co.

In 1906 the Central Georgia Power Company was organized by W. J. Massee and subsequently A. B. Leach & Co. acquired and now control the stock of this company. It runs and operates a hydro-electric power on the Ocmulgee River, near Jackson, Ga., with an installed hydraulic and electrical equipment with a generating capacity of 16,000 E. H. P. In 1910 W. J. Massee was its president, as he was of the Macon Railway and Light Company.

On February 3rd, 1910, a contract was entered into between the Central Georgia Power Company and the Macon Railway and Light Company, both controlled by A. B. Leach & Co. (the contract being signed by W. J. Massee, as president of each) under which the Power Company agreed to sell to the Railway and Light Company electric current, delivered at Macon, for approximately the equivalent of one cent per K. W. H. The Railway and Light Company obligated itself, during the life of this contract, 20 years, to purchase current from no other source; it was also obligated to keep, maintain and operate its steam plant, as an auxiliary, for generating and supplying current when the Power Company's current failed, the Power Company to pay the actual operating expenses and ordinary repairs. The Railway and Light Company further ob-

ligated itself to sell current for power only in amounts of less than 50 H. P. in Bibb county, and not to sell in any quantity outside of Bibb county. This 1910 contract was substituted for a contract between the same parties made in 1908, before the Power Company's plant was completed.

Subsequent to the acquisition by the Massee and Leach interests of all the above mentioned properties, A. B. Leach & Company formed a holding association under the laws of Massachusetts, to acquire the securities of the Central Georgia Power Company, the Macon Railway and Light Company, the Macon Gas Company, and the Central Georgia Transmission Company, this being a company organized to take the current of the Central Georgia Power Company, at its plant, and transmit and deliver it to customers in different cities.

The holding association is known as the "Georgia Light, Power and Railways" and controls securities of all the above mentioned companies, and in addition, we conclude practically controls the Georgia Public Service Corporation. So that it controls, without competition, the entire electric railway, electric light, electric power and gas business of the city of Macon and its suburbs.

In 1912, W. J. Massee severed his connection with all of the Leach properties, and shortly afterwards organized the Georgia Public Service Corporation and commenced the erection of a steam plant for generating electric current for lighting and power, his plant having two units, one of 1500 and the other of 500 K. W. capacity. This plant was completed and commenced business as an active and aggressive competitor of the Railway and Light Company in March, 1913, the reduced lighting and power rates by the Railway and Light Company effective March 1st, 1913, and still in effect being made to meet the situation as viewed by the old company.

The usual results followed and after six months of throat cutting, in October last, the Leach interests controlling

the Railway and Light Company purchased the stock of its competitor, the fight for business ceased, and simultaneously separate applications by the Railway and Light Company, and by the Public Service Corporation, were filed with the Commission for the approval of the scale of rates hereinbefore set forth.

Two Public Utilities in Same Business in Same City.

Under normal conditions these applications by separate companies should be considered separately by this Commission, and as required by law this Commission would prescribe just and reasonable rates for each company. In doing so, under the conditions existing in Macon, the Commission finds itself much restricted and hindered.

The courts have long since settled the question as to what constitutes a just and reasonable rate; to be such, it must afford a fair return upon the fair value of the property at the time devoted to the public use, provided it be not more than the service rendered to the public is reasonably worth. It is manifestly impossible for the two companies as distinct, separate and independent entities, to continue in the same business in the same territory upon different scales of rates. The one with the lower rate and equal service, as a real competitor and not restrained by common ownership, would soon have all the business, or certainly all it could serve.

This Commission is not a judicial body, and in a rate question, certainly, is without power to pass upon the legality of the consolidation of competing light companies in Macon, the subsequent acquisition by the consolidated interests of the Gas Company and the Public Service Corporation, or of the restrictive or restraining features in the contract between the Central Georgia Power Company and the Macon Railway and Light Company. Such questions are for the courts.

Certainly as the result of competition between the Public Service Corporation and the Railway and Light Company, the users of electric current in Macon enjoyed low prices for a season, but the inevitable result followed.

We do not believe that a business which supplies to a community, a public utility like gas or electricity, is one in which full and free competition between two companies engaged therein, can be expected to permanently prevail. Experience has demonstrated the world over, as it has in Macon, that when there is more than one such company in a city engaged in the same business, while active competition may prevail for a while, sooner or later, the competing companies find it to their interest to reach an understanding as to prices, or to a division of territory, or both, and in the great majority of cases the two companies either become one or the control of both passes into the same hands.

Our public policy in Georgia has been to encourage competition as a provider of good service and a regulator of prices, and yet at the same time we have adopted the policy of governmental regulation as necessary to secure these ends, and to prevent unlawful discriminations, which always find their best breeding places in unrestrained competition.

We do not believe competition can ever be a consistent and proper regulator of rates and other conditions in the public utility field. Real competition in such a field means duplication of plants, which when once built, are generally useless for other purposes.

In 1912 there was in Macon an established light and power company, with plant and capacity sufficiently large or capable of enlargement, to serve the city for many years. Instead of coming to this Commission for fair and reasonable rates or for improvement in service, if unsatisfactory; instead of taking steps to compel this established company to furnish all proper and reasonable service at fair rates, the city adopted the policy of granting franchises to another

company to come in and share the business, or to compete for it. This company, before it could serve the public, had to provide itself with an expensive plant and equipment, as well as with business and operating organizations. The result is that real competition is now gone, and there is invested in these duplicate plants and organizations; in this city, much more property, much more labor, supplies and services for supplying electric light and power than is needed or would have been made with only one company, upon which, under the law, so long as bona fide devoted to public uses, the public must pay returns.

As already intimated it is not improbable that since both are now controlled by the same interests, one will gradually be dismantled, much of its property wasted and permitted to decay, and in some way and in the end, the public will have paid for it.

The Commission earnestly believes that it would be wise if the Legislature would prohibit the building of duplicate public utilities, or the grant of franchises to such, prior to application to and issuance by this Commission of certificates of public convenience and necessity. In our opinion, the government which properly assumes to prescribe reasonable rates and compel adequate services by public utilities, should also protect such utilities and the public from unwise or useless competition and the wasteful investment of money in unnecessary plants.

Under all the conditions of common ownership attached to these properties, the Commission has reached the conclusion, in the interest of the public, that it should deal with the substantials, and not with theories, and that it should prescribe just and reasonable rates for the older and larger company; the one our inspection demonstrates has the better constructed and better equipped plant; the one incorporated with the electric street railway system, bringing about economical co-operation; the one with the larger and wider distribution system; and altogether the

one capable and able, or capable of being more economically enlarged, to efficiently serve the entire community.

In doing this, we are assuming, and logically so, that with common ownership and joint management as the evidence in this case shows already exist, and real competition already discontinued, the railway and light company will very soon have all the business, or so much thereof as it is able to carry with its present equipment.

In a separate order we shall prescribe the same rates for the Georgia Public Service Corporation. The plant of this company is not so large, expensive, or permanently constructed as the Railway and Light Company's properties, and in our opinion these rates, under normal conditions, will afford it fair returns upon the fair value of its property devoted to the public use.

In this treatment of these cases, from a rate standpoint, the Commission in no way commits itself upon the legality of the combination or ownership in common of the lighting properties involved. We are simply dealing with confronting conditions, not theories.

Segregation of Properties Devoted to Different Uses.

In support of its application for increased rates for commercial and residence lighting and for power, the applicant insisted that in ascertaining whether the present scale of lighting and power rates was sufficient to provide it with a fair return upon the fair value of its property, the Commission should consider its investments and its business, as a whole, contending that if its revenues from all sources, including transportation, lighting and power, were insufficient to give it fair returns, its lighting and power rates should be increased, *because* under its franchise from the city, it had accepted the burden of supplying all three services concurrently, with the proviso that the railway transportation charges should at no time or under any

circumstances exceed the rate now in effect, to-wit, five cents for a continuous ride within a four mile radius of the city hall, and universal transfers. The company, therefore, insists that as there can be no increase in transportation charges, even though they should be inadequate, any increase of revenue necessary for a fair return on the entire property, must come from increased lighting and power rates.

The Commission can not adopt this view. The Railway and Light Company is rendering two distinct services, transportation and lighting. While some of the properties necessary in furnishing these facilities are used in common, very much the larger percentage of its property as to the two services, is distinct.

The Commission cannot see either the legality or justice of compelling light customers of the company to share in any losses it may incur in transporting its railway patrons. Losses, if any, from inadequate railway fares cannot be compensated by extortionate lighting rates. The fact that under the franchise grant by the city, the company contracted, under the one grant to render the two services and accepted a maximum rate for one, need not be considered by this Commission in the pending application.

The properties used by the company must be segregated; the value of the property used for lighting and power purposes ascertained and lighting and power rates based thereon. In ascertaining the values hereinafter stated, property used in common has been prorated according to uses made of it by each service. This practice has been heretofore followed by the Commission in similar cases, and will not be departed from in this instance.

Franchise Values.

The applicant contends that to its physical property values should be added, for rate making purposes, the value of its franchises granted by the city. Following its own precedent the Commission, will not, for rate making pur-

poses, include the value of franchises *donated* by the public, in the value of property upon which fair returns should be had. The franchise under discussion is the right to occupy and use the streets of Macon as rights of way, etc. These streets belong to the public. The right to use them, as granted, is a valuable right, and hence the franchise is taxed as a property right. But this valuable property right in the public streets was *donated* by the public.

Every dollar of expense attached to its use, including taxes, is repaid by the public to the company, in the rates which have been and will be allowed. The public should not be required, in addition to pay a return to the company upon the value of property donated, in order that it might be used to serve the public.

Going Value.

The applicant further contends that a large sum, to-wit, from 25 to 30 per cent. of the total values of the physical properties used in the public service, should be added to the physical property values, as "going concern value" or "going value." The question of "going value" has been much discussed, by courts and Commissions, during the past few years. It arises in three distinct classes of cases, to-wit, capitalization issues, in rate applications and in sale or purchase transactions. The principles applying in one class have sometimes been applied to the others. In our opinion, there are important distinctions, particularly between capitalization and purchase or sale cases, and rate making cases.

It is well to have clearly defined just what is meant by "going value" or "going concern value." As we understand the term, it means a value due to the fact that a plant has consumers actually using its product; that it is in actual and successful operation, and has attached to it a developed business. As we understand, the claim in this case is, that to actual physical values there should be added a sum

representing the value of this business and the expense incurred in attaching it.

In a *rate* consideration we distinguish between the value of the attached business, as a property addition, and the actual cash outlay made in attaching the business. The Commission will not allow as added property upon which returns should be perpetually paid by the public, the value of the established business. We do not mean to say that we have in reaching conclusions as to values herginafter stated, treated certain physical properties as individual, disconnected units. We have considered them as integral and essential parts of a completed, perfected plant, capable of and ready to serve. In these values we have included overhead charges, such as organization, engineering, contractors' profits, reasonable promotion expenses, legal expenses, interest during construction, insurance, etc. In so far as "going value" includes such elements as actual expense of attaching business, we believe that it should be recognized in the earlier or beginning rates of a public service corporation and for a sufficient period to reimburse the company for such reasonable expenditures. This is done when such expenses are carried, as they should be and are, in operating expenses. But to allow them in "operating expenses" and at the same time add fixed values to physical property values and tax the public perpetually to afford a return thereon, is contrary to our convictions of right.

In the application under consideration, it should be borne in mind that the Railway and Light Company is a consolidation only ten years since of established corporations. The present company was not a pioneer; it succeeded going concerns. The record shows that if it during its brief existence of ten years incurred any expenses in attaching business, it has repaid itself fully in its earlier rates of fifteen cents per K. W. H. down to twelve cents per K. W. H. prevailing at the time competition reduced them on March 1st, 1913. That its earlier rates repaid it for all such expenses is

clearly shown when it is noted that since its organization the company has paid from earnings annual interest on its bonds, six per cent. on its preferred stock, and in 1910 and 1911 four and one-half per cent. on its common stock and in 1912, seven per cent., and in addition accumulated $450,000.00 of surplus earnings.

We have given thorough consideration to this question, so earnestly pressed by counsel for applicant, but are firmly of the conviction that "going value" should not be included in a valuation of a public utility for rate making purposes, and in so holding are following the large preponderance of court and Commission precedents.

Excluding "franchises" and "going value" the Commission has attempted to ascertain from the record the fair value of the lighting and power property of the Railway and Light Company, as it stands to-day, used or useful in supplying the public in Macon with electric current for lighting and power purposes. We have not had an independent appraisal made, because after careful examination and checking of the inventories, appraisals and estimates submitted by the company's engineer, Mr. L. A. McGraw, we did not deem the expense necessary. We have also compared Mr. McGraw's estimates with data already in the possession of the Commission, and are satisfied that the unit prices and costs used by Mr. McGraw are approximately correct, and that therefrom, and from general information and data already in its possession, the Commission, after excluding certain items, in our opinion improperly included in Mr. McGraw's inventories and estimates, has been able to ascertain the fair value of the property used and useful for lighting and power purposes, as it stands at this time.

Valuation Physical Properties of Macon Railway and Light Company Used in Commercial and Residence Lighting and Power.

	Reproduction New	Depreciated
Steam Plants:		
Real estate and buildings	$ 69,140.00	$ 69,140.00
Coal trestle and storage	690.00	620.00
Machinery and equipment of all kinds	278,176.00	236,450.00
Total steam plant and equipment	$348,006.00	$306,210.00
Less proportion assigned to railway department on basis of percentage of total current used by it in 1912, to-wit, 49.7 per cent, 1913 not used because of special conditions existing in that year	172,958.00	152,186.00
Prorata total valuation steam plant assigned to light and power department on basis percentage of current used, 50.3 per cent.	175,048.00	154,024.00
Sub Station and Equipment:		
Sub station and installed equipment used by light and power department, excluding street lighting equipment and pro rata of real estate and buildings	28,970.00	27,623.00
Distribution:		
Overhead lines and distribution, excluding lines and distribu-		

	Reproduction New	Depreciated
MISCELLANEOUS:		
Including stable equipment, tools, furniture and fixtures	9,506.00	7,996.00
Add working capital, including stores necessary to carry	25,000.00	25,000.00
Total physical properties used and useful in commercial and residence lighting and power	$550,521.00	$464,241.00

VALUATION PHYSICAL PROPERTY USED IN STREET LIGHTING.

	Reproduction New	Depreciated
SUB STATION EQUIPMENT:		
Arc lamps, rectifiers, transformers, protective apparatus, switch board, wiring, etc.	$ 44,160.00	$ 39,744.00
Laboratories, arc and meter departments	2,070.00	1,863.00
Overhead lines, arc circuits, lamps, etc.	49,207.00	39,366.00
Total valuation physical properties used and useful in street lighting	$ 95,437.00	$ 80,973.00

If the valuation of property used in street lighting, as given above, is added to the valuation of property used in commercial and residence lighting and power, we have as the total valuation of all property used for lighting and power, including working capital:

Commercial and residence and power	$550,521.00	$464,241.00
Street lighting	95,437.00	80,973.00
	$645,958.00	$545,214.00

We are of the opinion that in prescribing rates for commerical and residence lighting and for power rates, under the conditions developed in this case, it is necessary to *exclude* from valuations of property used and useful in its lighting department, such property as is needed for and exclusively used in supplying and distributing current for municipal lighting, as also all revenue and operating expenses from income and expense accounts, for the following reasons:

MUNICIPAL LIGHTING AND PROPERTIES.

It appears from the record that the municipal lighting since July 1st, 1913, has been done at prices which it is alleged are below cost. Arc lights, for example, are furnished at $21.95 each per annum. Taking current from the Power Company at its contract price, it would cost the Railway and Light Company about $23.55 per lamp, to perform this service, exclusive of taxes, interest and depreciation. Municipal lighting, however, is performed under a contract between the Central Georgia Power Company and the city of Macon. The entire street lighting system, including every line and all equipment, valued by us as above stated, is owned and maintained by the Macon Railway and Light Company, which to July 1st, 1913 did the municipal street lighting. It appears that the Power Company renders its monthly bills to the city for municipal lighting nominally done by it under its contract, collects the same, and turns the money over to the Railway and Light Company, which last company credits it to its income account.

The current necessary for street lighting is furnished by the Power Company to the Railway and Light Company and charged at the contract rates mentioned earlier in this opinion. The Railway and Light Company, it appears, furnishes to the Power Company equipment valued by us at $80,973.00, properly maintains the same, stands the heavy

depreciation therein, pays all taxes and every other charge thereon, solely to enable the Power Company to perform its contract obligations to the city. In addition the Railway and Light Company allows the Power Company to charge to its account every kilo-watt of current used to carry out the Power Company's contract for street lighting, and receives as compensation for the use of its street lighting equipment, operating expenses, maintenance, depreciation, taxes, fixed charges, and the supplying of electric current, the prices per arc and lamp named in the Power Company's contract with the city. Every cent of loss involved in doing the municipal lighting in Macon under a contract with the Power Company, is borne by the Railway and Light Company, so far as the record shows.

If the contract to perform the street municipal lighting for the public, at a loss, was with the Railway and Light Company, there might be urged some ground for allowing the company to recoup losses thus incurred in serving the public, out of the other lighting rates to the public. But here is a contract, in which the Railway and Light Company, in so far as the record shows, had neither part nor lot, and yet it has apparently undertaken to carry out its obligations, at an actual loss.

For these reasons we think it proper to exclude from our valuation, so much of the lighting property of the Railway and Light Company, as is devoted, not to the public's use, but to the use of the Central Georgia Power Company in the fulfillment of its contract with the city, and permit the Railway and Light Company to look to the Power Company for a fair return thereon.

We shall also exclude from the Railway and Light Company's income account the amounts due the Power Company by the city for street lighting under contract to be performed by the Power Company. In so far as possible, we shall also exclude from operating expenses of the Railway and Light Company, all expenses incurred by it in performing services for the Power Company.

So excluded, in our opinion, a fair valuation of the property, used and useful, in commercial and residence lighting and in supplying electric current for retail power purposes, at this time, including necessary working capital, is $464,241.00.

Auxiliary Steam Plant.

We have, as will be noted included in this valuation, 50.3 per cent. of the appraised value of the steam plant, owned by the company, and since current has been purchased from the Power Company only used as an auxiliary steam plant. This allocation of value is based upon the percentage of total current used by the Railway and Light Company in its lighting and power service, the remaining value 49.7 per cent being assigned to the railway department. Properly allocated, a portion of the lighting value should have been assigned to the street lighting service, as the plant also serves as an auxiliary or breakdown plant for every department. It is not without hesitation that we allow this auxiliary steam plant valuation in our valuations of property necessary for the performance of its public duties by the Railway and Light Company. In this section of the country, where in certain seasons there is a shortage of rainfall, we consider a steam plant, as essential to full and uninterrupted service, as an auxiliary to a hydro-electric plant. Under contracts for firm power or continuous primary current, the duty to provide and maintain the auxiliary is upon the seller of current, not upon the customer. When this burden is assumed by the latter, it is the rule, as well as right, that it should be compensated by the seller in the grant of a lower rate. The Macon Railway and Light Company contracted for continuous, fixed, primary current. It owns and maintains the auxiliary necessary to insure it against break-downs or stoppages of current and suspension of its public service. Having supplied this investment,

it should have compensation therefor from the Power Company, for whose benefit it is supplied and maintained. The Power Company, in a measure, has recognized this by agreeing to pay the expenses of operation, when it is called into service, and claims that the fact that the investment is supplied by the Railway and Light Company, has been recognized and compensated in the contract rate for current, approximately the equivalent of one cent per kilo-watt hour, measured in Macon after the voltage has been transformed to 2300 volts.

In our opinion, the contract rate is rather full and borders close to being unreasonably high. It is contended by the Railway and Light Company's representatives, and they are also the Power Company's representatives, that current cannot be generated by steam in Macon for less than one and a quarter cent per K. W. H. and that therefore the current is being obtained for less than it can be manufactured.

From our observation, and from data obtained from other sources, we are inclined to believe that one and a quarter cent per K. W. H. as the cost of manufacturing current by steam in Macon is full, but for present purposes we do not take issue with the estimate. The real question is what does it cost the Central Georgia Power Company to supply this current, under the conditions of its contract with the Railway and Light Company, and what selling figure would afford it, also a corporation serving the public, a fair return upon the fair value of its property. It is not our purpose to rule on this question, but in passing we content ourselves with the observation that this Commission, in prescribing reasonable and just rates for light and power supplied the Macon public by the Railway and Light Company, does not feel bound to accept the contract price paid for current by the Railway Company to the Power Company, as conclusive or binding on it. The public need not suffer because of the unreasonable cost of current

furnished to it by the Railway Company, whether this cost results from an unwise purchase contract, or extravagant, unwise and needless operating expense or plant investment in manufacturing.

In arriving at a conclusion as to what is a just and reasonable rate for the Railway and Light Company to charge its customers, the Commission has considered that the rate prescribed ought to be such as will pay the reasonable expenses of operation, taxes, depreciation or destruction of property in its daily use, and interest on the fair value of the property used, including the risks incident thereto. In this case the Commission is of the opinion that four and one-half per cent. per annum on the value of the entire property, is a fair annual allowance for depreciation. Taxes are fixed by law. In our opinion the income tax to be paid the city, for the first time in 1914, will be approximately set off by the deduction of the city's proportion of the franchise tax assessed under the Act of 1902, and the allowances for special taxes heretofore. The net increase in taxes to be assessed for 1914 because of the income tax to the city, will not be appreciable.

The Commission has made a careful study of the operating expenses of the company for the past four years, and is of the opinion that they are reasonable, and that the company has been economically operated. Of course the large increase in the percentage of operating expenses to the total revenue for 1913, is explained by the fact that the revenue for 1913, in the lighting department, owing to the loss of business from competition, was reduced about $100,000.00, with no possibility of a like cutting down of operating expenses. The operating expenses, in dollars, have increased over a few years back, because of increase in wages and in the prices of materials and supplies, and perhaps somewhat to conditions in the past year, now removed.

The Commission has had the petitioner furnish it with practically every detail of its lighting and power business

for each of the years 1912 and 1913, the first as representing normal conditions and the second, exceedingly active competitive conditions. We have required a complete segregation of the commercial and residence lighting, showing the number of customers in each rate class, and the K. W. H. consumption by each class. We have required exhibits of the results of the application of the existing scale of rates to each class of consumers, of the petitioned for scale of rates, and of two different scales proposed by the Commission, including the scale hereinafter adopted. These have each been carefully proven by the rate expert of the Commission.

From a study of the record in this case and our independent investigations, the Commission is of the opinion that at this time and under present conditions a just and reasonable scale of net rates for commercial and residence lighting and for power, to be charged by the Macon Railway and Light Company, is as follows:

LIGHTING RATES:

For the first	50	K. W. H.'s	9¢
For the next	50	"	7¢
"	100	"	6¢
"	300	"	5¢
"	500	"	4¢
"	4000	"	3¢
For all over	5000	"	2¢

POWER:

For the first	100	K. W. H.'s	5¢
For the next	400	"	3¢
"	500	"	2.5¢
"	1500	"	2¢
"	2500	"	1.75¢
For all over	5000	"	1.5¢

We know of no more accurate way in which to ascertain probable income under this scale than to apply it to the actual business of the company for the past year, and see what it would have done had it been in force during this period.

We have had this application made to the business actually done in November and January, and from the results calculated the increased percentage of revenue for these two months, and then applied the same percentage to the year's business.

The following calculations show the process and results:

INCOME AND EXPENSES MACON RAILWAY AND LIGHT COMPANY LIGHT AND POWER, 1913 AND 1914.

Actual Revenue.

	Revenue	Operating Expenses and Taxes
March, 1913	$ 10,877.53	$ 9,160.98
April, 1913	9,341.59	8,744.65
May, 1913	8,810.54	8,481.78
June, 1913	8,382.65	8,366.17
July, 1913	6,810.57	8,276.41
August, 1913	6,381.41	8,546.82
September, 1913	7,243.04	8,480.64
October, 1913	8,851.17	8,702.00
November, 1913	8,776.23	7,235.62
December, 1913	9,484.38	8,151.22
January, 1914	9,204.74	8,407.60
February, 1914 (estimated)	8,560.00	8,415.00
	$102,723.85	$100,968.89
Less street and municipal lighting	15,976.00	17,694.00
	$ 86,747.85	$ 83,274.89

COMPARISON BETWEEN APPLICATION OF 9c NET PROPOSED SCALE TO TWO MONTHS ACTUAL BUSINESS, WITH RECEIPTS UNDER EXISTING SCALE EXCLUDING STREET AND MUNICIPAL LIGHTING UNDER CONTRACT TO C. G. POWER CO.

November, 1913.

Gross actual light and power revenue under present scale	$ 8,776.23
Less revenue from street and municipal lighting	1,248.95
Commercial and residence lighting and retail power	$ 7,527.28
Gross light and power revenue, under proposed 9 ct. scale	$ 13,784.44
Less revenue from street and municipal lighting	1,248.95
Commercial and residence lighting and retail power under proposed 9 ct. scale, on actual business	$ 12,535.49
Actual revenue under present scale	7,527.28
Increase over actual receipts under present scale by application of proposed 9 ct. scale to November business	$ 5,008.21

Equivalent to 66.53 per cent. increase under proposed scale applied to actual November business over actual receipts from existing scale.

January, 1914.

Gross actual light and power revenue under present scale	$ 9,204.74
Less revenue from street and municipal lighting	1,302.48
Commercial and residence lighting and retail power	$ 7,902.26
Gross light and power revenue under proposed 9 ct. base, applied to January business	$ 14,526.17
Less street and municipal lighting	1,302.48

Commercial and residence lighting and retail power		$ 13,223.69
Actual revenue under present scale		7,902.26
Increase over actual revenue under present scale by application of proposed 9 ct. scale to January business		$ 5,321.43

Equivalent to 67.34 per cent. increase under proposed scale applied to actual January, 1914, business over actual receipts from existing scale; or

An average increase for the two months on the actual business of these months of 66.93 per cent.

The total income of the company under existing rates for the twelve months ending February 28th, 1914, based upon actual receipts for eleven months, and estimated receipts for February, exclusive of street and municipal lighting under contract to the Central Georgia Power Co., is		$ 86,747.85
This sum would have been increased had the proposed 9 ct. base scale been in effect, 66.93 per cent., aggregating		58,060.33
Making the total revenue from commercial and residence lighting and retail power, as thus increased		$144,808.18
Actual operating expenses and taxes as reported by the company, for 11 months ending January 31, 1914, for light and power		92,553.89
Estimated for February, 1914, average per month of preceding 11 months, which is high for February		8,415.00
Total operating expenses and taxes for 12 months ending February 28, 1914		$100,968.89
From which deduct expenses on account of street and municipal lighting		17,694.00

Leaving operating expenses and taxes chargeable to commercial and residence lighting and retail power for 12 months ending February 28, 1914		$ 83,274.89
Street and Municipal Light Expenses:		
Current for streets	$ 9,482.00	
Current for municipal buildings	368.00	
Taxes 15% of whole	1,865.00	
Maintenance	5,979.00	
Total	$17,694.00	
To operating expenses and taxes should be added depreciation, which in this case we are of the opinion, will be amply covered by 4½% annually on the present value of the entire physical property devoted to commercial and residence lighting and retail power, including land, to-wit, $439,241.00		$ 19,765.84
Making total operating expenses, taxes and annual depreciation		$103,040.73
As against an income of		144,808.18
Upon the actual business for the past 12 months under application of the proposed 9 ct. base scale; or		
A surplus of		$ 41,767.45

Which is 8.99 per cent. on our estimate of the fair value of the property, including working capital, devoted at this time to the public use in supplying commercial and residence lighting and retail power in Macon.

It should be borne in mind that these results are obtained from simple application of the proposed new rates to the actual business of the past twelve months, beyond any question the most unfavorable in the history of the company, the business that the railway held under the fiercest competition.

We believe there is an annual normal increase in this business in Macon, from natural growth, of ten to fifteen per cent. Competition, neither fierce nor mild, exists longer, and for the future when every prospect pleases, it does not seem forced to conclude that if under 1913 conditions and its unusual expenses on the business of that year, the proposed scale would have earned 9 per cent. on the value of the investment, an equal return will be had in 1914.

In adopting the above scale the Commission took into consideration that of the 2319 light consumers the company had in November, 1913, 408 consume less than 12 K. W. H. per month and 1421 consume between 12 and 50 K. W. H.'s per month, these two classes constituting approximately 80 per cent. of the total number of lighting customers on the company's books. The total K. W. H.'s of current sold for lighting, in November, to its 2319 customers were 173,284, of which approximately only 23 per cent. or 39,060 K. W. H.'s were used by 1829 customers in monthly quantities of 50 K. W. H.'s and less. Of the total light customers 1720 were residence light customers.

It must be clear to every one that it costs an electric light company more, per K. W. H., to serve one patron using 12 K. W. H.'s monthly, than it does one using 200 or 500 K. W. H.'s monthly. It costs the company just as much to keep the book account, read the meter, make out the bill, collect the account, etc., for the small customer as for the larger. The investment and maintenance in poles, transmission, meters, transformers, etc., for the small customer is more or less than that to serve the large customer, according to the distance from the central station. The smaller the units of delivery, that is as delivering stations are multiplied, the loss in current is multiplied. A company can serve one customer taking 2000 K. W. H.'s per month, profitably at a price per K. W. H. which would break or bankrupt it to deliver the same current to 200 customers, in quantities of 10 K. W. H.'s each per month. The expense

of rendering the service is not the only item; the distribution loss in current is far heavier, as small individual consumers are taken on. Of four and one-quarter million K. W. H.'s of light and power current bought of the Central Georgia Power Company by the Railway and Light Company, per annum, and paid for, the Railway and Light Company charges to its customers and gets pay from them for less than three and one-quarter million K. W. H.'s. The balance of the current bought and paid for by it, at its substation in Macon is lost in transmission to and distribution among its numerous patrons.

To be fair to the company, it is absolutely necessary, because of its investment and the expense in serving small customers, to allow a considerably higher rate on this class than is allowed for larger consumers.

This Commission has repeatedly required light companies, under their obligations to serve, to extend lines and install meters, at considerable expense, into virgin territory, for only two or three and even one customer. Residence lighting customers, generally, are farther located from the central plant or substation and not so closely located, as the stores, offices and manufacturing plants in the business section of a city, and hence often require larger individual investments in poles and wire, and require more of the time of repair gangs, meter readers, collectors, etc., in serving them.

The scale prescribed by the Commission is materially lower than that asked for by petitioner. Counsel for the city and citizens opposed to the grant of the application contrasted the net base rate asked for by the petition, 10 cents K. W. H. with the base rates in Atlanta and Jacksonville, to-wit, 7 cents. A comparison of the base rates alone, does not afford a fair index of the rates as a whole. The entire scale should be compared. In doing this there are local conditions which must be also considered. Atlanta is a much more densely populated city than Macon, and to

that extent it costs less to serve its people. The proportion of large consumers to small consumers is much larger in Atlanta than in Macon. The entire volume of business is many times as large. The Atlanta scale, which was not prescribed by this Commission, is relatively lower for small consumers than for the larger consumers. Jacksonville owns and operates a municipal plant. The money to build it was furnished by the public from public taxation and the investment is therefore that of the public. No returns on the investment to the owners, in the form of dividends, have to be earned; the owners, the public, can only secure such returns in the form of low rates. Of course, the municipal plant pays no taxes, either city, state or federal; the public therefore loses all tax income from this investment which if privately owned, it would secure. The loss of taxes and returns in the form of dividends, therefore should be reflected in the rates. Under the law, owners of a private plant devoted to public use, are entitled to and cannot be denied fair returns on the fair value of their property, and are also entitled to reflect in their rates, all governmental taxes, licenses, assessments and charges. It follows, therefore, as beyond question, that a municipal plant, without the burdens of earning returns for its owners and of tax contributions, not only can, but should give lower rates to its public owners.

We have had the rate expert prepare the following table showing the actual charges paid by different classes of light consumers under the rates in effect in Atlanta and in Jacksonville, and the charges which will be paid in Macon by the same classes, under application of the rates herein prescribed for that city:

COMPARISON OF ELECTRIC LIGHT BILLS FOR ELECTRIC LIGHTING PURPOSES IN JACKSONVILLE, ATLANTA AND MACON, GEORGIA.

Based on Proposed Scale for Macon.

K. W. H.'s Consumed	Atlanta	Jacksonville	Macon
10 K. W. H.	$ 1.00	50¢ to $2.00	$ 1.00
30	2.10	2.10	2.70
50	3.50	3.50	4.50
100	7.00	7.00	8.00
150	10.50	10.50	11.00
200	13.20	14.00	14.00
300	18.60	21.00	19.00
400	24.00	28.00	24.00
500	29.40	35.00	29.00
1000	56.40	63.00	49.00
2000	116.50	119.00	79.00
3000	152.50	157.50	109.00
4000	188.50	168.00	139.00
5000	224.50	210.00	169.00
10000	404.50	420.00	269.00
15000	584.50	630.00	369.00

All the above monthly charges based on consumption are net charges predicated upon prompt payment of bills.

It will be noted that the Commission has prescribed a minimum charge of $1.00 per meter per month. In our opinion this is a reasonable and just charge. The company is required to serve the public at any hour of the twenty-four the customer calls upon it; to do this, it must invest large sums in its plant and equipment, and hold it in absolute readiness to serve whenever called upon: it must keep its plant, lines and equipment in order; it must preserve its organization; it must keep employed officers and employees by the year; its accounts must be kept; meters read monthly and the same expense incurred in these and similar items,

whether the consumption be two or one thousand K. W. H.'s per customer. The $1.00 minimum charge is prescribed to compensate the company in a measure for its constant readiness to serve and the reasonable going expenses of keeping in such a state of readiness.

The scale of prices for light and power which we have prescribed are to be made effective on and after March 1st, next.

Special Contract Rates.

All special rates, whether in the form of contracts for definite periods, or informal, in excess of these prescribed rates are illegal. The rates prescribed are maximum rates and cannot be exceeded. Should the Railway and Light Company have outstanding contracts, verbal or written, which are at less than the rates prescribed, they must be abrogated as unlawfully discriminatory, and made to correspond with the Commission's scale, or the same special rates given to all of the public.

The Commission has given careful consideration to the contentions of counsel for firms and individuals holding term contracts made at the rates now in effect, that they should stand and be carried out by the company. To allow them to stand and to require others of the public to pay higher rates would be rank discrimination; such a condition cannot be allowed to exist. One of the chief objects of the creation of this Commission, was that it should at all times prevent unlawful discriminations, and compel equality of service and charge to all under like circumstances and conditions. Unlawful discriminations arising out of different rates can only be removed by moving the lower rate up to the higher, or the higher to the lower.

The rates prescribed herein are in the opinion of the Commission, at this time, just and reasonable. We have no power to compel the company to accept less, except as im-

plied in the power to prevent unlawful discrimination. The courts have repeatedly ruled upon the principles involved in this question, and our own Supreme Court has several times held that the regulatory power of the Commission cannot be set aside by contracts of this character. Its latest deliverance on this question was in the railroad mileage case (80 S. E. Rep. p. 332) in which it said:

"'In the cases last cited the Supreme Court of the United States held that contracts already made (in the one case as to rates, in the other as to free transportation) must yield to lawful regulation as to interstate commerce.''

"In the Armour case (209 U.S. 82) Mr. Justice Day said:

'If the shipper sees fit to make a contract covering a definite period for a rate in force at the time, he must be taken to have done so, subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law.'"

In *Kentucky and Indiana Bridge Company* v. *L. & N. R. R. Co.* (12 I.C.C. Rep. 162), Judge Cooley said:

"If the Legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable."

We do not deem it necessary to multiply citations on this question. These contracts for rates lower than those prescribed in this case must be abrogated, or the public generally put upon the same basis, on and after March 1st, next.

Conclusions.

We believe in the foregoing that we have substantially covered the material issues raised in this record. Because of the peculiar conditions heretofore existing in Macon, of the wide-spread interest in the existing light rate situation and of the fact that so many citizens have a direct pecuniary

interest in the subject, we have felt it advisable to go into the discussion at the length and in the elementary way that we have. Such discussion and explanation of our views is due the public and the petitioner.

The rates prescribed are subject, of course, to future investigation and review by the Commission. It is our purpose to require monthly reports, for the next twelve months, from each company, showing the actual results of their business and on their returns, of the application of the prescribed rates. At the expiration of this period should these results satisfy us that there ought to be further decreases, or increases, the Commission will act accordingly. It has been the purpose and desire of the Commission to deal fairly with the company, as well as with the public.

This Commission feels deeply the burden of responsibility on it in rate cases, and is fully conscious of the possibilities of disastrous results to public service corporations and the public alike, should it, carelessly or innocently, prescribe unjust and unreasonably low rates. There is need, as there are opportunities, for great industrial developments in Georgia. To fully meet this need and improve these opportunities, capital other than our own must be attracted. There is no surer way of doing this, than at all times treating it and its owners fairly.

There are risks and hazards in public utility investments, not always carried by private enterprises. There should be recognition of this in prescribing rates; they should allow some compensation therefor. Investors in public utility enterprises unquestionably surrender or rather have to yield to governmental agencies in the regulation and control of their rates and services. They are not free to do as they will with their property, nor get what they can out of it. They are subject to the will of the people whom they serve, and having such powers, it seems to us, that there should be recognition at all times of corresponding obligations for at least fair treatment.

The rates which we have prescribed, will, we believe, earn fair returns, under wise and economical management, upon the fair values of the properties devoted to the public use. We believe the services to the public are reasonably worth the prices we have fixed. If at the expiration of one year under their operation, we find we are mistaken, we shall promptly undertake to revise them.

GEORGIA, FULTON COUNTY.

I, A. O. RANDALL, Secretary of the Georgia Public Service Commission, do hereby certify that I am the duly appointed officer of said Commission in charge of the records of the Commission, and authorized by law to certify copies thereof, and do hereby certify that the attached photostatic sheets designated as "Electric Rates, pages 259 through 281" are true and correct copies of the originals thereof as taken from the 41st Annual Report of the Railroad Commission of Georgia for the year 1913, which is of record with the Commission.

I further certify that the official title of the Railroad Commission of Georgia has been changed by statute to the Georgia Public Service Commission.

GIVEN UNDER MY HAND AND THE OFFICIAL SEAL OF THE GEORGIA PUBLIC SERVICE COMMISSION, this the 12th day of July, 1955.

/s/ A. O. RANDALL
A. O. RANDALL, *Secretary*

In The

Supreme Court of the United States

October Term, 1955

No. 17

United Gas Pipe Line Company,

Petitioner,

v.

Mobile Gas Service Corporation and Federal Power Commission,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER UNITED GAS PIPE LINE COMPANY TO RESPONDENT MOBILE GAS SERVICE CORPORATION AND THE CITY OF TYLER AND TYLER GAS SERVICE COMPANY AMICI CURIAE.

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1. Mobile's Attempted Distinction Of Armour's Case Untenable.

Mobile (Br. 14-18) suggests *Armour* (209 U.S. 56 (1908)) is inapplicable because of the difference between the railroad industry and the gas industry so that there is a purported difference between the Interstate Commerce Act and the Natural Gas Act. Such differences are immaterial to Congressional intent. Both businesses are engaged in transportation and services connected therewith. In both Acts Congress regulates rates so that the same rate or a "just and reasonable" rate shall be applicable to all alike.

"Secret rebates", to prevent which Mobile suggests was the purpose of the Interstate Commerce Act, are no differ-

ent from "undue preferences or advantage", or "any unreasonable difference in rates * * *" etc., "as between localities or * * * classes of service" outlawed by Section 4(b) of the Act. Secret rebates for railroad transportation produces the very undue preferences and advantages and unreasonable differences in rates, charges, services, facilities, etc., which the Act prohibits.

If it be "clear" that "private rate contracts are outlawed" (Br. 15) by the Interstate Commerce Act, it is equally clear that the Natural Gas Act likewise outlaws such contracts. Mobile concedes that the underlying purpose of the Interstate Commerce Act was "* * * to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight and that the filed and published rate equally known by and available to every shipper" (Br. 14 from 209 U.S. 56 at 80). No better description can be written of the Congressional purpose in Section 4 of the Natural Gas Act. Comparison of the two Acts shows a substantial similarity in their provisions.

Mobile would have it that difference in permissive filing of contracts is significant. It is, but the conclusion Mobile draws is erroneous, for while the end result of the two Acts respecting contracts is the same, Congress in the Natural Gas Act took pains by the language of Sections 4 and 5(a) to spell out in detail the complete subjection of contracts to the purposes and procedures provided in the Act. Filing is not a touchstone of validity or enforceability. The underlying philosophy of the Act to establish a "just and reasonable" rate applicable to all without any undue preference or advantages or any unreasonable differences between rates either as between localities or classes of service renders all contracts or other arrangements interferring with such Congressional mandate "inoperative" or invalid or unenforceable, as the Fifth Circuit declares in

Mississippi Power & Light Company v. *Memphis Natural Gas Company* (1947) 162 F. 2d 388, cert. den. 332 U.S. 770. See, too, *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipeline Company* (D.C.E.D. Mich. 1948) 80 F. Supp. 27, affirmed 1949, 6 Cir. 173 F. 2d 784.

In its effort to create and nourish the notion that differences between the railroad and natural gas business make contracts in the gas business sacrosanct, Mobile points (Br. 18-19) to its assignment of its industrial sale contracts to United. It quotes testimony of United's witness, Mr. Pittman, at Docket G-6060 before the Commission as confirmatory. Mobile merely seeks deviation. Of course, contracts were the prevailing mode before the Act preempted control of the regulated field. Regulated contracts of interstate pipe line companies rate-wise are tied to the "cost of service" principle of the Commission. Freedom of contract thus disappears before the statutory requirement. Mobile points out the obvious fact that direct industrial sales by United under such assigned contracts are not subject to Commission jurisdiction. The quotation of the Pittman testimony (Br. 19) points to such contracts. Freedom to contract in that outside area exists. Unlike the regulated interstate pipe-line contract rate tied to cost of service, Mr. Pittman points out that direct industrial sale contracts are negotiated on the basis of "value of fuel" (Transcript, hearing G-6060, p. 33), which takes into account competitive prices and conditions. These assigned direct industrial contract sales being non-jurisdictional are thus not subject to the Act. Non-regulable contracts such as these can have no bearing here, for they cannot change the provisions of the Act or affect United's duty under Section 4, when arising, to file an increase in regulated rates without the prior consent of the buyer, even though the superseded rate be embodied in a contract.

It is worth remembering that Congress excluded direct industrial sales from jurisdiction of the Act because competition was considered protection enough.[1] Obviously the business necessities of industry require different treatment than the fluctuating demands of domestic users. Continuity of business practice requires a steady level of delivery which, considered against the competition Congress noted, is protection against exploitation; whereas the uneven use of the domestic consumer puts him at a disadvantage, thus creating the "public interest" committed to regulation.

Concededly, Mobile is fully aware of these considerations. In the same proceeding in which Mr. Pittman testified Mr. Maurice White, President of Mobile, was also a witness. In direct testimony prepared by Mobile's attorneys, he stated Mobile found the assignment of industrial contracts desirable because, inter alia, regulation under the Act, particularly the 30-day provision of Section 4(d) made it unfeasible to make a firm contract with such industries, particularly because they stated their dissatisfaction with the

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[1] The hearings on the Natural Gas Act with respect to direct industrial sales show:

1. H.R. 4008, introduced January 27, 1937, 75th Cong. 1st Sess., originally provided that the Act should not be construed as authorizing the Commission to fix rates for the sale of gas distributed locally or for the sale of gas for industrial use only. Commenting on a similar provision contained in a predecessor Bill, H.R. 11,662, introduced March 6, 1936, 74th Cong., 2nd Sess., Dozier A. DeVane, Federal Power Commission Solicitor, said:

> "Likewise, natural gas in the process of transportation in high-pressure mains in interstate commerce for industrial use is excluded upon the basis that such sale is made under highly competitive conditions and is not imbued with a public interest. In short, this subsection [Subsection 1(b)] limits the exercise of its authority to only those interstate activities which include natural gas intended for ultimate distribution to the public, as that phase of its activities places the natural gas company in the status of a public utility enjoying a monopolistic position subject to regulation in the public interest."

2. On March 25, 1937, at Hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., William A. Dougherty suggested certain amendments to exclude from jurisdiction under the Act direct industrials and resales for industrial

uncertainty resulting from the 30-day possibility (Tr. 56).

On cross-examination by Commission Staff as to why Mobile had not brought to hearing its application before the Alabama Commission for increased rates, Mr. White was asked whether Mobile's over-all earnings would not permit an increase even though Mobile was incurring a loss on the particular sale to Ideal, bringing the answer "Yes. Our attorneys felt that, in view of our excess earnings at that time it wouldn't be in the public interest. Therefore the Commission wouldn't entertain the idea." (Tr. 64). Mr. White then admitted that the Alabama Commission ordered Mobile to refund excess earnings in the year 1953 (Tr. 64), even though the increased rates from United had been in effect for approximately six months.

If Mobile should be upheld in its contention that those subject to regulation can freely make contracts which will be valid and binding in accordance with their terms, despite

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use only, saying that industrial gas "is sold under a separate agreement or a separate rate schedule than applies to the gas that is sold for general use and therefore is a separate transaction." (p. 124.)

HR 4008 was amended by the House Sub-Committee as reflected by the Confidential Committee Print No. 1 dated April 22, 1937, 75th Cong. 1st Sess., and the present form of Section 1(b) was achieved. The italicized portions represent additions and changes made by the Committee; the print through which lines are drawn represents language deleted:

Section 1. (b)

"(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale *in interstate commerce* of ~~such~~ natural gas for resale ~~to the public~~ *for ultimate public consumption for domestic, commercial, industrial, or any other use*, and to natural gas companies engaged in such transportation or sale, but shall not apply to *any other transportation or sale of natural gas or to* the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. ~~Provided, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only.~~"

Consideration of these changes shows the Committee considered the provision of inapplicability, i.e., "to any other transportation or sale of natural gas" did the work of the stricken proviso, as so amended the provision of HR 4008 is identical with the language presently contained in Section 1(b) of the Act.

the regulation, then any natural gas company can negotiate contracts in the regulated area with the same freedom they now can a non-regulable contract. But Congress first must rewrite the Act, for a contract covering the subject matter regulated by the Act cannot be validly made and performed as contracts normally are; whereas contracts free from regulation are, and must be, performed in accordance with the law of contracts.

2. Mobile's Error Lies In Considering Contracts As Such Without Regard To The Effect Which The Act Has Upon Them.

Though expressly conceding power to subject contracts to the regulatory scheme and that the Interstate Commerce Act, for example, had such effect, Mobile says that in the Gas Act, Congress must be deemed to have known enough about the law of contracts to realize that no contract could be changed without consent of both parties (Br. 22), and relies on *Wichita's* case (260 U.S. 48 (1942)). The argument runs (Br. 35), that Section 20 of the Kansas Statute is like Section 4(d), but immediately concedes no similarity by the express admission that no rate filed under Section 20 of the Kansas Act could become operative by Section 20, whereas the changed rate filed under Section 4(d) of this Act "becomes effective in 30 days unless suspended, and becomes permanently effective after five months of suspension unless affirmatively found unreasonable by the Commission after a hearing under 4(e)". What a difference! This Court in *Wichita* held that no rate at any time under any condition could become effective under the Kansas statute except pursuant to the hearing and express finding required by Section 13. The Act provides no such scheme. Of course, Mobile is ill-advised in the use of "per-

manently effective" for no rate ever becomes "permanently effective" — all rates are always subject to change either by the natural gas company under Section 4 or by the Commission under Section 5.

Finally, Mobile (Br. 56) makes a concession peculiarly applicable to *Wichita's* case, when it says "* * * we do not think the citation of authorities from State courts, or even from this Court, when dealing with the construction of State statutes, as they have been construed by State courts, is of much assistance in construing the Natural Gas Act." We agree with Mobile (Br. 37) that *Wichita* involved a Kansas statute and followed what this Court found to be its interpretation by the Kansas courts, which "of course, was binding on this Court".

Mobile, ignoring the plain meaning of Section 4(d), asserts that it merely prohibits parties to a contract from changing contract rates without notice to the Commission and Public. Apart from the clear provision of Section 4(d) permitting changes in contracts by subjecting them to the scheme of Section 4, the trouble with Mobile's position is that if a contract covering a rate regulable by the Commission can be changed only by a 5(a) proceeding initiated by the Commission and no access to Section 4 can be had until the completion of the 5(a) proceeding, there would never be occasion for the 4(d) "notice", for the right requiring such 4(d) "notice" would be non-existent. Mobile concedes all through its brief that in a 5(a) hearing the Commission is obligated to set the "just and reasonable" rate thereafter to be observed. Notice of a rate so adjudicated to a party in the situation of Mobile would serve no practical or legal purpose.

The specious cry of "want of mutuality" (Br. 24) was fully exposed by this Court in *Union Dry Goods* (1919, 248 U.S. 372) and cases therein cited. Clearly disingenuous is

the suggestion that to follow the clear meaning of Section 4(d) would be to say that "Congress had delegated its power to abrogate contracts to one of the parties to the contract" (Br. 9). Congress established Section 4 as the hub of the Act, made contracts expressly subject to the scheme of the Section, required natural gas companies to comply, and vested its statutory agent with exclusive and adequate power to supervise and control.

Further in the teeth of the Act, Mobile suggests that parties to contracts fix rates, not the Commission; and that the Commission only reviews for the purpose of determining whether the parties have fixed rates within the "zone of reason" (Br. 9, 25). This premise is false because it assumes a power in "parties to a contract" not granted by the Act except to the Commission. The conclusion is thus equally false. The natural gas company is required by Section 4 always to file and propose such changes necessary to maintain just and reasonable rates.[2] The Commission is given power by Section 4 to determine whether such rates are just and reasonable, and to permit their becoming effective with or without hearing. Section 5(a) vests the Commission with power always to review a rate, whether fixed or merely permitted to be filed. Thus the Commission

[2] In FN 2 (Br. 4) Mobile's reference to the argument below is inaccurate. Counsel for Mobile in discussing the opinion of the Trial Court in *Tyler Gas Service Co. v. United Gas Pipe Line Company* (R. 73, et seq.) said (Tr. of oral argument, Third Circuit, p. 11):

> "Now, I don't propose that Mr. Fletcher will tell us that his company was acting in bad faith or had its fingers crossed and was trying to deceive the good citizens of Tyler when they made that representation."

Counsel for United answered that question (at p. 75, Trans. of oral argument) as follows:

> "Now counsel says, was it in good faith? In the Tyler case both sides stipulated that the latter was done and the contract executed in good faith. There was no question of bad faith. There was simply the question, the unfortunate question, that neither side went to the books, as they could have done, and perhaps should have done, to determine the status of the law, they just simply made the contract and they made the contract to meet that particular situation."

is relieved of any restriction from its prior act in permitting a rate then deemed just and reasonable to become effective. Mobile does not need to go to state statutes (Br. 26), for this Court in the *Montana-Dakota* case (1951, 341 U.S. 251) declared that a "just and reasonable" rate was not a pin point but an area, and that no one was entitled to a rate as reasonable or legal save to that level within such area made "specific" by the Commission. The determination by the Commission is accompanied by a considerable amount of discretion. The area furnishes the boundaries for judicial review under Section 19 to determine whether the end result of rate fixing by the Commission is to be approved. Of course, it is the public interest which requires contracts to be inferior to regulation, and not economic favoritism. None such is here involved, for here the Commission is exclusively authorized to determine what is "just and reasonable" and to fix the rates in accordance therewith. This duty in the public interest is superior to private contract. Mobile's argument is without force.

3. The Effect Of Filing Of The Conversion Tariff Upon The Contract.

Mobile suggests (Br. 6) that this issue is not properly before the Court. It is of the utmost significance to note that Mobile does not deny the devastating fact that the suit contract was replaced and superseded by the conversion tariff; it grumbles only of its dislike of the protocol of recognition of such destruction. A dead contract is not revitalized by seeking to hide its death.

The orders of the Commission are subject to judicial notice and knowledge. The authorities make clear that all of such matters being a part of the archives and official records of the Commission will be considered by the Courts, irrespective of whether they are in the particular record.

See Ground 4, Footnote 53, p. 74, United's brief. Mobile does not answer or meet these authorities, nor the fact that the decision in *Tyler's* case is authority for the fact that the filing of the conversion tariff superseded the contract, after which the contract was no longer in existence. (See p. 5-7 United's brief.) In addition, Mobile quotes (Br. 7) out of context an excerpt from an order of the Commission overruling application for rehearing in Docket R-107. The excerpt in its proper context is as follows:

> "As stated in Order No. 144, Sec. 154.85 of the newly amended regulations expresses 'the Commission's intention to permit contracts now on file as effective rate schedules to continue in effect as executed service agreements until they expire or are superseded.' The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only.
>
> "The right of a natural-gas company, as given by the Natural Gas Act, to make changes in filed rate schedules, tariffs and contracts is preserved, as it must be. The amended regulations do, however, impose certain conditions which must be satisfied by any natural-gas company which proposes to change any such filed rate schedule, tariff or contract. Among other things, it must (1) give adequate notice as required by Section 4(d) of the Act and Sections 154.16 and 154.22 of the regulations, including service upon each affected customer; and (2) furnish to the Commission information as to the reasons and justification for the proposed change, as required by Section 154.63 of the amended regulations. Moreover, Section 154.27 permits affected customers, and other interested parties, to submit comments concerning such proposed changes, without limitation of any right to protest or complain.
>
> "In the light of these statements, it should be clear that Section 154.85 does not express a new policy of

the Commission or a new construction by it of provisions of the Natural Gas Act." CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951, Decisions R. 9090.

Properly quoted the order of the Commission confirms the contentions and position of United.

4. Mobile's Cases Are Not Apropos.

Mobile does not meet or answer the points and authorities in United's brief. Save for a few ineffectual generalizations, it does not attempt to discuss them. Instead it cites cases not dealing with the matters at issue here.

Its misapprehension of *Armour* (209 U.S. 56 (1907)) and the inappositness of *Wichita* (260 U.S. 48 (1922)) have been demonstrated. While conceding that *Midland* (300 U.S. 169 (1937)) supports United's position, it seeks to escape it on insupportable grounds exposed in United's brief (p. 62, Fn. 50 p. 63-4).

With the air of great discovery, it cites (Br. 25-6) three cases discussing the so-called "zone of reason" *Wichita Gas Co.* v. *Public Service Com.* (D.C. Kan. 1933) 2 F. S. 792, modified (1934) 290 U.S. 561; *Washington Gas Light Co.* v. *Baker* (D.C. Cir. 1950) 188 F. 2d 11, cert. den. (1951) 340 U.S. 952; *United Railways & Electric Co.* v. *West* (1930) 280 U.S. 234, 251). None involve the Act or are shown to turn on statutes having any similarity to the Act. None remotely suggest support for Mobile's claim that a filing within the "zone of reason" drains all regulatory power from the administrative agent, leaving it mandatory for the administrative agent to accept in toto. Speculation about a "zone of reason" is unnecessary in the face of this Court's clear holding in *Montana Dakota* ((1951), 341 U.S. 246, 251), defining the "area" of "just and reasonable" under the Act, and the broad power in the Commission exclusively to make specific the point within the "area" at which the approved rate shall be fixed.

The same ostrich behaviorism marks its discussion of *Union's* case ((1919) 248 U.S. 372) for Mobile refuses to recognize or credit the fact that the opinion of the Georgia Commission (Pet. App. p. 13) clearly establishes that there was no administrative hearing on the application of Union Dry Goods' supplier, and thus no hearing or evidence that any contract was against the public interest such as Mobile contends for here. The opinion also shows that at the particular hearing, no evidence was taken on the contract situation; there was received only a protest on ground of law. Equally clear is the legal fact that the Georgia Commission and Courts rested their decision on the ground that fixation of rates *pursuant to statutory* procedures as a matter of law superseded and rendered nugatory all conflicting contractual arrangements.

Mobile repeats (Br. 46-48) its attempted distinctions of *Tyler's* case (D.C.E.D. Tex. (1953) R. 73, aff. 5 Cir. 1954, 217 F. 2d 73) made in its Opposition Brief (p. 11-3) which were demonstrated to be incorrect in United's Reply to Opposition (p. 1-4). (See, too, p. 69-73 United's main brief.) Tyler Gas Service Company and the City of Tyler have filed herein a brief styled "Amici Curiae" in support of Mobile, and the *Tyler* case will be noticed further in the reply thereto.

At Br. 49 under the heading "The Majority View", Mobile discusses cases involving State statutes. They do not assist Mobile.

In *Commonwealth v. Shenandoah River Power & Light Corporation* (1923) 135 Va. 7, 115 S.E. 695, the Supreme Court of Virginia stated that there were only "slight differences between the Kansas statutes which were under review in that case [*Wichita R.R. v. Pub. Util. Comm.* 260 U. S. 48] and the Virginia statutes", and after quoting from *Wichita's* case held that the Virginia statute "clearly

indicat[ed] the limiting conditions precedent" to the abrogation of contract, i.e., that the contract rate should be "found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of the law" (p. 702). Thus the Virginia statute is like the Kansas statute which this Court in *Wichita* held permitted no change at any time in any rate except upon the express finding of unreasonableness. *Wichita's* case has been demonstrated inapplicable.

Mobile next cites (Br. 49) *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.* (1924, D.C.R.I.) 295 F. 895. This case shows that the Rhode Island statute is also like that of Kansas and was distinguished in United's brief, p. 78.

In the same vein Mobile quotes from *Rutland Railway, Light & Power Co.* v. *Burditt* (1920) 94 Vermont 421, 111 Atl. 582, but fails to advise this Court that the Vermont statute as cited by the Court:

> "* * * provides just two ways by which the rates are fixed or changed: Either by agreement, or by the public service commission, upon due notice and hearing." (p. 53.)

Mobile's quotation is thus put in its true light, for there the utility was adjudged undertaking to proceed without statutory authority. Decisions under such a statute can throw no light upon the vastly different Act here.

Re Searsport Water Co. (1919) 118 Me. 382, 108 Atl. 452, is no better. Looking at the Maine statute, the Court said that a presumption of reasonableness arose and controlled until unreasonableness was otherwise determined by the Commission after hearing upon complaint of the consumer under Section 43, of the utility under Section 50, or upon the Commission's own motion under Section 48, all three

sections being a part of Chapter 55 of the Maine Statutes (p. 4-7-8). Thus, Maine contemplated preservation of contract rates until a hearing and expressly authorized the utility to complain of unreasonableness.

Congress in Section 5(a) denied the natural gas company the right to complain of unreasonableness of an existing rate whether fixed by contract or otherwise. The balancing requirement upon the natural gas company by Section 4 to charge only just and reasonable rates with unhampered duty to propose changes to preserve justness and reasonableness gave flexibility and vitality to a design which would produce maximum protection for the public interest proposed to be preserved. Judicial holding (see p. 57, Fn. 42, United's brief) that the Commission in a 4(e) hearing has all of the powers it can exercise in a Section 5(a) proceeding demonstrates the meticulous care with which Congress ordained that all rates, whether fixed by contract or otherwise, should always be subject to the balancing powers vested in the Commission by Sections 4 and 5(a).

Winfield v. *Public Service Commission of Indiana* (1918) 187 Indiana 53, 118 N.E. 531 (Mobile Br. p. 51) has nothing whatever to do with this case. The State of Indiana gave the town of Winfield a charter empowering it to contract in a proprietary capacity, which it did by executing a franchise for utility services stating maximum rates. Thereafter the State created the Commission as its administrative agent to regulate rates. The question was whether the power to contract granted in the charter prevented the State, under its police power, from exercising its sovereign power to regulate rates, whether up or down. The Court held such regulation not prevented, because the State had not waived its police power right to regulate.

Finally, Mobile cites (Br. 51) *Birmingham Electric Co.* v. *Alabama Public Service Commission* (1937) 233 Ala. 675,

173 So. 19. This case arose on demurrer to defendant's bill of complaint attacking the validity and effectiveness of the Commission order. The Court repeatedly emphasized that in determining such demurrer it could "only consider the averments of the bill and its exhibits" (p. 20). Mobile's statement of what the rule of the case "appears to be" is shown to be the appellant's contention (p. 20). The Court's holding is as follows:

> "Without considering the question of whether the State Legislature has the right to set aside a contract so approved or to authorize the Public Service Commission to do so, we think that the Legislature has not so authorized the Commission, and that it cannot do so, without the consent of the parties." (p. 20.)

Thus the statute considered in that case like the Arkansas statute in *Arkansas Natural Gas Company* v. *Railroad Commission* (1923) 261 U.S. 379 (p. 79 United's brief) denied the Commission power to change or abrogate a contract, a point Mobile finally admits after much prodding (Mobile's Br. 29). Even though its attorneys "expressed some doubt" (Tr. Docket G-6060, p. 63) whether its Ideal contract could be reopened in view of Commission approval, Mobile's filing to the Alabama Commission and the compelling reasons for not prosecuting it to hearing (see p. 5 above) are highly persuasive that Mobile did not regard *Birmingham Electric* as declaring lack of power; rather, it points to excess earnings as dictating the choice to allow its application to lie fallow.

Thus the heading "The Majority View" (Mobile's Br. 49) upon examination is shown not to be a majority of anything. It demonstrates only that Virginia and Rhode Island have statutes like Kansas and that Vermont and Maine have still different statutes; but none of them are comparable to the Act. In truth, because of the peculiar face of such statutes, they represent a very small minority view.

Under the incorrect heading "Minority View" (Br. 51) Mobile unsuccessfully seeks escape from citation of state cases under statutes similar to the Act. Mobile cites *Hackensack Water Co. v. Board of Public Utility Commissioners* (1921) 96 N.J. L. 184, 115 Atl. 528. There, the Court affirmed an increase over rate agreements for water supply with 46 municipalities pursuant to a "unilateral" filing, followed by suspension and hearing, under a statute (quoted in part p. 530) comparable to Sections 4(d) and 4(e) of the Act. Instead of so filing under its contract with Hoboken, it sought a hearing under another section comparable to Section 5(a) (revised statutes 1937, Section 48: 2-21 b(1)) for the granting and determination of the amount of an increase. The Court reversed the Board, holding that contracts were subject to change and supersession under the Act. Applicability to Hoboken of the procedure applied to the 46 municipalities was neither presented nor discussed. In discussing ampleness of the state's statutory power the Court said:

> "It may be conceded that neither the City of Hoboken nor the water company can alter this contract without the consent of the other party to it, * * *" (p. 531).

This dictum is obviously addressed to the contract outside the statute; for the agreements of the other 46 municipalities had been altered, changed, and even abrogated by the statutory proceedings comparable to Sections 4(d) and 4(e).

In *Harrison* (New Jersey Suburban Water Co. v. Town of Harrison (1938 120 N.J. L. 546, 1 A. 2d 61), the Supreme Court said the quoted phrase from *Hackensack* was not essential to the decision but was a mere "concession" made argumentatively and not as a legal pronouncement. It followed this Court's decision in *Midland Realty Co.* v. *Kansas*

City Power & Light Co. (1937) 300 U.S. 109, quoting the holding that a rate filed by the utility and promulgated by the Commission in accordance with the statute had the same force as though directly promulgated by the legislature.

The Court of Errors and Appeals (1939) 122 N.J.L. 189, 3 A. 2d 623) reversed, holding the utility estopped to assert the filing was properly under the change of rate section comparable to Sections 4(d) and 4(e). It did not affirm its dictum in *Hackensack* as controlling *Harrison*, nor deny that a proper filing of changed rates under Section 48: 2-21 d (i.e. Section 4(d) and 4(e).) would validly and successfully effect a change of rates embraced in a contract. Estoppel was applied to prevent the change impliedly adjudged, otherwise change would have resulted. If its view was consonant with Mobile's contention estoppel was unnecessary, for the filing as claimed by *Harrison* would have been sterile and easily so stated.

It seems clear that a filing as to *Hoboken* and in *Harrison* like that applicable to the 46 municipalities in *Hackensack* would have produced the proposed change of rate. This is strongly supported by the Court's statement (p. 627):

> "If the stipulation adverted to had not been made, and the Board had exercised its power of suspension, the statutory limitation would furnish, as it was manifestly intended to, a cogent reason for action by the Board within the six months' period." (p. 627.)

Such hearing under Mobile's contention could not have been held for the filing, being illegal, would not have invoked the administrative duty.

One other illustration of the error in Mobile's thinking is deemed sufficient. Discussing certain New York cases (Br. 53) it states that *In re Dry Dock E. B. & B. R.R. Co.*

(1932) 254 N.Y. 305, 172 N.E. 516, refused to follow *Town of North Hempstead* v. *Public Service Corporation* (1921) 231 N.Y. 447, 132 N.E. 144, and *Public Service Commission* v. *Pavilion Natural Gas Co.* (1921) 232 N.Y. 146, 133 N.E. 427, and limited those cases "to the precise circumstances under which they arose". *In re Dry Dock* does not do any of those things.

Dry Dock attempted to increase by filing changes pursuant to Section 29 of the statute. The Court held that Section 29 applied only to those rates which, at common law, a utility or carrier could increase, whereas rates in a franchise granted by the Legislature could only be changed by the Legislature, and was outside the statute. (*People ex rel Garrison* v. *Nixon* (1920) 229 N.Y. 575, 128 N.E. 255, 256). By Section 49 it held the Legislature authorized the Commission thereafter to change such legislative franchise rates upon a finding of unreasonableness. Thus Section 49, not Section 29, was open to Dry Dock. There being no power to change those rates under Section 29, and considering the purpose of Section 49, there was no room for implication of power under Section 29 as was done under an "*analagous*" section of the statute in *North Hempstead*, a method of implication which might "appear defective and illogical".[3]

[3] The *North Hempstead* case was under Section 66 the "analagous" section of the same law, and was a provision for a change of rate by filing. The franchise was granted after the enactment of Section 66, so that the Court held that such Section "entered by implication into the terms of such consent; formed part of its obligations; and were notice to the Town that the consent was coupled with the provision of the statute that the defendant was empowered to abrogate it as to the rates stipulated therein, and was allowed by law to put into operation a new schedule of just and reasonable rates * * * on 30 days' notice to the Commission and publication for 30 days as required by order of the Commission." (p. 144-145.) The Court held that this power was balanced, for the town was protected by its right to complain under Sections 71 and 72, thus invoking determination of what would be "adequate, just and reasonable rate." See comparable holding relative to Section 5(a) in *Mississippi Power & Light Company* v. *Memphis Natural Gas Company* (1945) (5th Cir.) 162 F. 2d 388; cert. den. 332 U.S. 770.

Quotation of the holding in *North Hempstead* dispels the obscurity of Mobile's excerpt quoted Brief 53. The Court said:

> "This method of increasing rates without first obtaining an adjudication as to their reasonableness may appear defective and illogical, but no constitutional limitation or legislative power interdicts it, and no exception in favor of rates stipulated in a municipal consent granted subsequent to the enactment of the Public Service Commission's Law can be read into it without doing violence to the plain language of the statute." (p. 145.)

The excerpt from *Dry Dock* (Br. 53) is taken out of context. In its proper context Mobile's position is untenable, and the Court's meaning plain:

> "Certainly we may not strive, by forced constructions of the language of the statute, to find a legislative intent to authorize a method which 'may appear defective and illogical.' Under Section 49 of the Public Service Commission Law, the Legislature has delegated to the agency created by it the power, which the Legislature always possessed, to change maximum rates contained in earlier statutes when it appears that these rates are unjust and unreasonable, and the same section provides the method by which the agency may be called upon to act * * * Section 29 merely gives the Commission power to suspend a proposed increase and after a hearing to make its own order regulating the rate to be charged where, except for such suspension or new order the proposed increase would be lawful." (p. 519.)

Dry Dock (p. 519) neither criticizes *North Hempstead* and *Partition*, nor restricts them. It demonstrates why the rule there would not apply to *Dry Dock*. Conflict with *North Hempstead* and *Partition* is expressly denied by that Court (p. 519-20).

5. The Question Of Reparations And Refunds Which The Court Below Ordered.

Without meeting the authorities or answering the manifest lack of power of the Court below to order reparations, Mobile in one paragraph simply declares its right to reparations because the rates collected were allegedly "illegal," but in the following paragraph denies the Court reached the issue of the repayment which it ordered.

Of course the only "illegal" rate contemplated by the Act is one other than the filed rate. The order of the Court below requiring refunds of the "filed" rate would have effect to restore and establish the contract rate, which in turn had been superseded by the conversion tariff rate. The *Hackensack* case (1921) 96 N.J.L. 184, 115 Atl. 528, which Mobile cites (Br. 52) thus perfectly describes the action of the Court below in its invasion of the Commission's function to fix rates:

> "The action of the Supreme Court, in declaring the rate to be fixed by the Board, is in disregard of this statutory power conferred upon the latter, and which it is entitled to exercise without any limitation put upon it by the Court. The power to fix rates is not a judicial function, but a legislative one, and the state had created the Board of Public Utility Commissioners as its agent for that purpose. An attempt by the Supreme Court to fix a rate is in its essence an attempt to exercise a sovereign power which has not been delegated to it by the state, but which resides solely in the legislative and executive branches of the government." (p. 532.)

6. Reply To Paper Styled "Memorandum Brief In Support Of Mobile Gas Service Corporation For The City Of Tyler, Texas, And Tyler Gas Service Company Amici Curiae."

United has received through the mail an extraordinary paper styled as above, and though styled "In support of Mobile Gas Service Corporation," the document (p. 7-12) attacks what it conceives to be the holding of the Court below on the *Tyler* case as erroneous, a decision which Mobile here seeks to sustain. Mobile itself has sought to demonstrate that *Tyler* is an entirely different animal. (Mobile's Br. 46-7.) Primarily the Tyler document is an attempt to secure a review for Tyler Gas, though neither the City of Tyler or Tyler Gas took timely steps to petition this Court for a writ of certiorari. The decision of the United States Court of Appeals for the Fifth Circuit (No. 15034) in *Tyler's* case was filed on November 24, 1954, and is reported at 217 F. 2d 73. The decision of the District Court for the Eastern District of Texas is unreported but appears in the record hereof beginning page 73.

In the pleadings, by appearances in the Trial Court, and on the briefs both to the Trial Court and the Court of Appeals, Thomas B. Ramey, Esquire, and Bryce Rea, Jr., Esquire, appeared for Tyler Gas Service Company, and Troy Smith, Esquire, appeared for the City of Tyler.[4] Counsel for United, believing counsel for Mobile able ade-

[4] Transcript of record, United States Court of Appeals, 5 Cir. No. 15034, *Tyler Gas Service Company and the City of Tyler, Texas* v. *United Gas Pipe Line Company*: at page 25, signatures on joint bill of complaint show Thomas B. Ramey, Bryce Rea, Jr., "Attorneys for Plaintiff, Tyler Gas Service Company;" and Troy Smith, "Attorney for Plaintiff, City of Tyler." The transcript of record (p. 279) shows the same attorneys for Tyler Gas, and in addition to Troy Smith, Esquire, Ted Chilcoate, Assistant City Attorney, of Tyler, appeared in the trial court for the plaintiff The City of Tyler.

Mr. Rea was introduced to the Court by Mr. Ramey as "Of counsel for the Tyler Gas Service Company," same record, p. 225.

quately to present all questions of fact or law relevant to the disposition of the case, declined a request of counsel for Tyler Gas for consent to file a brief amicus curiae.[5] No motion was ever filed or served on United by Tyler Gas Service Company pursuant to Rule 42, Subdivision 3 of this Court.

The brief of the City of Tyler and Tyler Gas Service Company (Tyler Gas) is a melange of contentions, most of

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[5] Counsel for United received a letter dated March 10, 1955, on the letterhead of the Law Offices of Bryce Rea, Jr., Washington, D. C., as follows: (Emphasis shown as contained in original letter)

"Re: Federal Power Commission vs.
Mobile Gas Service Corporation.

"Dear Mr. Fletcher:

"As you, Tom Ramey, Louis Da Pra and I know so well, the basic problem in the *Mobile Case* and in the *Tyler Case* is the same. The *Tyler Case* has been and will be discussed and argued in the Supreme Court by the parties to the *Mobile Case*. In view of this and in view of the fact that Opinion and Order No. 277 leaves the issues therein between United and Tyler open and provides for further proceedings thereon, we should like to file a brief *amicus curiae* in the Supreme Court in support of Mobile and for the purpose of helping to put the *Tyler* opinion of the Fifth Circuit in perspective. We think this will be helpful to the Court, and to the expeditious final settlement of our case and of fundamental issues, and thus to the mutual benefit of all concerned.

"Since it is simpler under the Rules of the Supreme Court to file an *amicus* brief with the consent of the parties than to file after leave granted upon motion therefor, it would be appreciated if you would consent unless you would expect to object to a motion for leave to file. I have discussed the matter with the Commission, asked it to consent and expect that it will.

"Please let me hear from you as soon as you conveniently can. If you consent, a simple letter to me to that effect is all that is necessary.

Sincerely,

/s/ BRYCE REA, JR.
Bryce Rea, Jr.

BR/db
CC/Thomas B. Ramey, Esq."

United's counsel replied to Mr. Rea on March 11, 1955, with copy to Thomas B. Ramey, Esquire, and copies to associate counsel for United, W. O. Crain, Esquire, and C. Huffman Lewis, Esquire, as follows:

"Re: United Gas Pipe Line Company v.
Mobile Gas Service Corporation

"Dear Mr. Rea:

"I have your letter of March 10, 1955, requesting my consent for you to file an amicus curiae brief in the above cause.

"I am not able to give you the consent requested. My petition for

which were expressly adjudicated against them by the courts and incorrect statements, a few of which will be noticed to demonstrate the inaccuracy of the document.

1. The scope of the hearing in the Trial Court (Tyler Gas Br. 4-7) is incorrectly and too narrowly stated. Tyler Gas overlooks the fact that United's position in opposition both to the injunction and to the bill in its entirety was by

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certiorari was filed in the above matter on November 8, 1954. The decision of the United States Court of Appeals for the Fifth Circuit in Tyler Gas Service Company v. United Gas Pipe Line Company, was filed November 24, 1954. The ninety days for filing petition for certiorari to the decision in the Tyler Gas Service case expired February 22, 1955.

"I am convinced that the attorneys for Mobile Gas Service Corporation will adequately present all questions of fact and law bearing upon the issues in the above case from their viewpoint ably and efficiently.

Very truly yours,

/s/ THOMAS FLETCHER
THOMAS FLETCHER

TF:ec"

Copy of the letter to Mr. Rea was forwarded to the Solicitor General of the United States and interested attorneys for the Federal Power Commission.

Thereafter, United's counsel received through the mail a copy of a letter written by the Solicitor General of the United States dated March 18, 1955, also addressed to Mr. Rea, as follows:

"Re: Federal Power Commission v.
Mobile Gas Service Corp.,
U. S. Sup. Ct., No. 556, Oct. Term, 1954

Dear Mr. Rea:

"I have your letter of March 9, 1955, requesting the consent of the Federal Power Commission to your filing an *amicus* brief on behalf of Tyler Gas Service Company in the above-captioned case.

"Since I understand that counsel for United Gas Pipe Line Company has declined his consent in the companion case, involving the same issues, there seems little purpose in my taking any action on your request. However, I should point out that, while it is the policy of this Office to consent to the filing of *amicus* briefs on behalf of a party to a case pending in the courts raising the same or closely related issues, the Fifth Circuit's opinion in the *Tyler* case has by now become final.

Sincerely yours,

SIMON E. SOBELOFF,
Solicitor General."

The copy sent to United's counsel also shows copy to Willard W. Gatchell, Esquire, General Counsel of the Federal Power Commission.

motion to dismiss for want of jurisdiction and for want of equity, and for failure to state a claim. The scope of the hearing is accurately delineated by Chief Judge Hutcheson in his opinion in the case (*Tyler Gas Service Company* v. *United Gas Pipe Line Company* (1954) 217 F. 2d at p. 74-5).

2. Tyler Gas says (Br. 7) that its intervention at Docket G-2210 before the Federal Power Commission has not yet been finally ruled. It is true that the Commission in opinion and order 277 issued November 2, 1954, prior to the decision by the Fifth Circuit in Tyler Gas's case on November 24, 1954, held open said Docket at the request of Tyler Gas for the conclusion of the Court proceeding. The intervention raising the same issues raised in the court proceeding, the Court decision is conclusive of the issues sought to be raised by Tyler Gas in said intervention.

3. The statement is made (Br. 3) that the contract between Tyler Gas and United "committed United not to increase those rates for a period of sixteen years". Such was the contention advanced by Tyler Gas as the effect of said contract; said contract nowhere contained express language of agreement by United that it would not increase said rates.

4. It is said (Br. 7) that the decisions of the District Court and of the Court of Appeals was nothing other than that Tyler Gas and Tyler had not exhausted their administrative remedies. United in its brief (p. 69-73) has demonstrated such statement to be incorrect.

5. Tyler Gas says that the District Court and the United States Court of Appeals for the Fifth Circuit, and the Court below in Mobile, were all wrong in saying that the

"conversion tariff" modified or changed its contract (Br. S-10). The short answer is that the District Court so held; the Court of Appeals affirmed, and both judgments and decisions are long since final.[6]

6. Contention is advanced (Br. 9) that United's filing pursuant to Section 4(d) was "unilateral" and thus invalid. Again, both courts expressly repudiated this contention and those judgments are now final and conclusive upon Tyler and Tyler Gas.[7]

7. Challenging holdings both by the District Court and the Fifth Circuit, Tyler Gas and Tyler deny they admitted power in the Commission under the Act pursuant to Section 4 to fix rates at variance with contract rates (Br. 10-11). The holdings thereon of the Courts by which Tyler and

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[6] Decision of the District Court holding that the conversion tariff replaced, superseded and modified the contract which had not been in force for some months appears in this cause (R. 75-6, 79-80). The Fifth Circuit quoted this with approval in footnote 3, 217 F. 2d, at 75-6.

The pleading and protest of Tyler Gas to the Commission protesting the conversion tariff was Exhibit No. 22 of Tyler Gas, the same as Exhibit "A" to United's motion. (See record, Cause No. 15034 in the United States Court of Appeals for the Fifth Circuit, p. 187-90.) Mr. J. W. Hickman, President of Tyler Gas, testified that the protest was prepared by his Dallas attorney and transmitted to the Commission pursuant to his instructions (R. No. 15034, United States Court of Appeals for the Fifth Circuit, p. 288). The prayer of the protest sought a hearing (R. No. 15034, United States Court of Appeals for the Fifth Circuit, p. 83). The order of the Commission at Docket G-2019 permitting the conversion tariff as to Tyler Gas to be filed appears here (R. 60).

On cross-examination Mr. Hickman testified, and it was thereupon conceded by counsel for Tyler Gas, that no appeal pursuant to Section 19(b) of the Act was taken from the order permitting the conversion tariff to be filed. (R. No. 15034, p. 305.) Relying on *Sunshine Anthracite Coal Company* v. *Atkins* (1940) 310 U.S. 381, United's position, which the Courts sustained, was that the conversion tariff superseded the contract which thus had not been in existence for months.

[7] Holding of the District Judge, R. 78-9; express concurrence of the Fifth Circuit, 217 F. 2d at p. 78.

Tyler Gas are concluded are abundantly supported by the record.[8]

Mobile's case was argued to the United States Court of Appeals for the Third Circuit on May 19, 1954. When Tyler Gas and Tyler filed their brief in the *Tyler Gas* case in the Fifth Circuit the latter part of August, 1954, the Tyler Gas position was changed and Tyler Gas sought to embrace Mobile's position respecting Section 5(a). United noting

[8] From the brief of Tyler Gas to the District Judge:

(a) "In a word, the extent of the relief herein sought by the plaintiffs is simply the maintenance of the status quo of the existing rate schedules until such time as the Federal Power Commission shall have rendered an adjudication on the pending application of United for an increase in rates. * * * No question is raised as to the power vested in the Federal Power Commission to regulate the rates charged by United to Tyler Gas, nor do we question here the authority and prerogatives of the Federal Power Commission to modify or amend the rate schedule prescribed in the existing contracts. * * * Furthermore, no attack is here made upon any other action heretofore taken by the Federal Power Commission. Simply stated, plaintiff's position is that inasmuch as the Federal Power Commission has not yet made a decision respecting the justness, reasonableness and lawfulness of the revised schedule of rates, the existing contract rates should be permitted to stand until such time as the Federal Power Commission does reach and announce a decision with reference to same." (p. 6-7.)

(b) "Expressly recognizing that the proposed increase in rates 'may be unjust or unreasonable or otherwise unlawful,' by its order issued July 10 the Commission suspended said rates until December 25, 1953, and 'until such further time as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.' Thereby the Commission exhausted its statutory power to 'suspend and defer the effectiveness of such rates.'" (p. 18-19.)

(c) "The filing of new rate schedules with the Federal Power Commission by Defendant without the consent of Tyler Gas on June 24, 1953, did not modify the contract between Tyler Gas and Defendant. To effectuate modification one of two things was necessary, namely, either failure of the Commission to act for a period of thirty days, or an order of the Commission permitting or requiring the proposed rates to become effective. Neither of these things took place. Instead, the Commission, acting under Section 4(e) of the Act upon a finding that the new rates may be unjust and unreasonable, suspended their use for a period of five months, and ordered a hearing to be held respecting their justness, reasonableness and lawfulness. Under Section 4(e) that power having been exercised, the proposed rates can become effective only upon an order of the Commission after the conclusion of the proceedings or upon a motion by Defendant made at the expiration of the suspension period, by which motion the suspension is lifted and the rates become effective even though the proceedings to determine their lawfulness have not been concluded." (p. 30-1.)

this change accepted it, contesting it on the same grounds and authorities relied on in the Court below. The Fifth Circuit did not accept the contentions of Tyler Gas based upon Section 5(a) of the Act. (217 F. 2d 73.)

8. Tyler Gas says that its bill of complaint had also tendered allegations about resale for industrial use only rates, and admits that they had gone into effect (Br. 11-12). The claims on these were waived to the Trial Court.[9]

9. At various places Tyler and Tyler Gas assert there was a contract between the City of Tyler and United. United denied a contract and asserted no power in the City of Tyler to make a contract as claimed. The Trial Court expressed "difficulty spelling out all the elements of a contract between United and City, * * *" (R. 80) but concluded that the presence of the City as a party did not strengthen the position of Tyler Gas and thus found it unnecessary to determine the question (R. 80). The Fifth Circuit concurred, 217 F. 2d at 75.

10. The "Amici" nowhere pose any position or contention on behalf of the City of Tyler which bears on any point or question for decision in this case — there is only presented errors which Tyler Gas complains were com-

[9] Upon the pleading tendering issues on industrial rates which were already in effect United by motion asserted that the Commission and interested parties were indispensable parties if the Court was to require the Commission to recall such order. In response to that, Thomas B. Ramey, Esquire, leading attorney for Tyler Gas, said to the Court:

"* * * the industrial rates have already been put into effect; therefore, we are pretermitted from the consideration, so far as we are concerned, of the Court, for in our application for temporary injunction, any application to the industrial rate." (p. 225, R. in No. 18034, United States Court of Appeals for the Fifth Circuit, Tyler Gas Service Co., et al v. United Gas Pipe Line Company.)

mitted against it in a decision against which it sought no review.

Respectfully submitted,

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION
AND FEDERAL POWER COMMISSION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF OF PETITIONER.

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November 4, 1955

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

In The

Supreme Court of the United States

October Term, 1955

No. 17

United Gas Pipe Line Company,

Petitioner,

v.

Mobile Gas Service Corporation and Federal Power Commission,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER.

Mobile's counsel has called attention to Footnote 15, Page 49, of his brief for Respondent in Nos. 51 and 53, this Term, styled *Federal Power Commission v. Sierra Pacific Power Company* and *Pacific Gas & Electric Company v. Sierra Pacific Power Company* in which is discussed *United Gas Pipe Line Company v. Federal Power Commission* (1955, 5 Cir.) 220 F. 2d 706, cert. den. October 10, 1955, in No. 302. Mobile completely misunderstands such case. Properly understood, it lends no support to the inferences suggested by Footnote 15. No contract versus a change of rate filing under Section 4(d) was involved. No such issues were there involved as are here presented for decision. The facts conclusively so show.

The record and Fifth Circuit opinion show that the Commission permitted Supplement 11, dated September 7, 1945, to Rate Schedule F. P. C. Nos. 9, 10, and 11 to be filed by United Gas Pipe Line Company. This provided for maximum daily delivery of 73,000 MCF at a commodity price of 5¢; also for option to Mississippi River Fuel Corporation (Mississippi) to increase its delivery requirements. This option was exercised March 28, 1949, by additional daily requirements of 122,000 MCF, or an aggregate maximum daily delivery thereafter of 195,000 MCF.

To cover the additional delivery of 122,000 MCF the parties, on November 16, 1949, executed Supplement No. 15. This raised the commodity price for the additional gas to 6.5¢ per MCF, because it was anticipated that the 122,000 MCF would be met with purchases of "surplus gas" from the Carthage Field at an initial cost of 7.5¢ per MCF which when "rolled in" with the 5¢ of Supplement 11 produced the 6.5¢.

The Commission required in addition to Supplement 15 a letter agreement (i.e., Supplement 1 to Supplement 15) as part of the rate schedule for two essential purposes: (1) United to make, subject to Commission approval, an adjustment as of each March 1st in the commodity charge in the event that surplus gas purchases chargeable to Mississippi's additional requirements during the preceding 12 months should be less than 122,000 MCF, and (2) since United served other customers from the Carthage Field; if it should increase its contractual commitments to such others over an average daily delivery of 25,000 MCF, then all purchases by United under "surplus gas" contracts should be allocated between such others and Mississippi in that proportion which Mississippi's increased requirements bore to all increased requirements over commitments to such others in effect on March 28, 1949. It subsequently

developed that United was unable to obtain sufficient quantities of "surplus gas" to fulfill the additional commitment to Mississippi.

The Commission ruled that the rate schedules in Supplement 15 and Supplement 1 to Supplement 15 as approved by it contained as an integral part the two requirements of Supplement 1 to Supplement 15 so that the 6.5c commodity price was solely applicable (per demonstration in the adjustment as of each March first), to that proportion of surplus gas from the Carthage Field delivered to Mississippi against the additional 122,000 MCF, so that all gas delivered against the 122,000 MCF not identified as Carthage surplus gas was only chargeably at a commodity price of 5c pursuant to Supplement 11, *the only filed effective rate to Mississippi covering deliveries other than the 122,000 MCF.*

United contended that Supplement 15 replaced Supplement 11, and that being unable to obtain Carthage surplus gas in adequate quantities but being required by Commission approval to the additional delivery, it had obtained other gas, for such exoneration, at a cost of 7.5c and thus was entitled to so charge pursuant to Supplement 15, notwithstanding the provision of Supplement 1 thereto. The Commission answered that United could only obtain such right to charge 6.5c for non-Carthage gas by filing a proposed rate change pursuant to Section 4(d).

The Courts said the Commission was correct on both counts.

There was nowhere a claim or issue by any party that Supplement 15 and Supplement 1 to Supplement 15, *as contracts*, were superior or immune to Section 4 or subject to change only by prior held Section 5(a) proceedings. On January 3, 1953, after expiration of five months' suspension (R. 60), United's Conversion Tariff applicable to Mis-

sissippi superseded and replaced Supplement 11, Supplement 15, and Supplement 1 to Supplement 15, since which date said Supplements have not governed such deliveries.

Respectfully submitted,

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the contract between Tyler Gas and United "had already been modified in what seems to have been an adversary proceeding." 215 F. 2d 883, 884, fn. 3. In fact, that contract was modified in the same way and at the same time as was the contract between United and Mobile, i.e., by the filing of a "conversion" tariff pursuant to Rule 154.82 of the Rules of the Federal Power Commission, which required the restatement of rates in specific dollars and cents terms. The effect of the restatement of the rates to Tyler Gas was to increase slightly the industrial rate and decrease slightly the domestic rate. There was no proceeding, adversary or otherwise, respecting this filing. While the conversion tariff was under consideration by the Commission Tyler Gas wrote a letter to the Commission protesting the increase in the industrial rate. That letter was not a formal complaint. Federal Power Commission Rule 1.6 (b). Only formal complaints "will initiate formal proceedings or make complainant a party to proceedings already initiated." Federal Power Commission Rule 1.6 (a) (2). The letter thus did not make Tyler Gas a party to any proceeding or raise any issue for decision by the Commission. Furthermore, the Commission neither passed on the merits of any claim in connection with United's conversion rates, nor approved the rates. It simply issued an order accepting the rates for filing and permitting them to take effect. That order expressly recited that its issuance was not approval of any "service, rate, charge, classification, or any rule, regulation, contract, or practice . . . nor . . . recognition of any claimed contractual right or obligation."

The letter of Tyler Gas protesting the conversion tariff did not and could not raise the issue of the right of United unilaterally to violate its contracts by a voluntary filing under Section 4 of the Natural Gas Act. It is to be emphasized that United's conversion tariff was filed in compliance with Rule 154.82 of the Federal Power Commission, requiring the rates provided in contracts to be restated in dollars and cents per unit. Rule 154.83 required the restatement by a date certain. United thus did not file its conversion tariff voluntarily. Indeed, in *United Gas Pipe Line Co.* v. *F. P. C.*, 181 F. 2d 796, it sought to challenge the Rule in the United States Court of Appeals for the District of Columbia Circuit. The Court did not pass on the validity of the Rule but dismissed the petition for review on the ground that the Rule was issued in the exercise of the Commission's rule making and not its judicial or quasi-judicial authority, and was therefore judicially reviewable only in the District Court by way of a suit for injunction or defense of an action to enforce compliance with it.

Thus the only issues Tyler Gas could raise in connection with the filing of the conversion tariff were the authority for and the appropriateness of the rule of the Federal Power Commission requiring the modification of the contract between Tyler Gas and United. The issue in the *Tyler* and *Mobile* Cases is not the propriety or appropriateness of any action of the Federal Power Commission finding contracts unjust, unreasonable or otherwise improper and requiring them to be modified. On the contrary, the issue is whether such action is a pre-requisite to their modification.

In any event, the modification of the contracts effected by the Commission in its order of July 31, 1952, under Rule 154.82 did not destroy the contracts. They are in effect as modified. Rule 154.85 of the Commission specifically provides that existing contracts modified by Rule 154.82 remain in effect except to the extent that they are superseded by filings under Rule 154.82. Since the contract between Tyler Gas and United precludes an increase in rate during the term of the contract, it necessarily precludes the filing of an increase under Section 4 of the Natural Gas Act. This result is clearly contemplated by the Rules of the Federal Power Commission. Rule 154.38 (d) (3) provides that a natural gas company *may* include in its contract the reservation of a right to propose to the Commission changes in the effective rates, provided that the reservation effectuates changes only in the manner provided in Section 4 of the Natural Gas Act. United having failed to reserve a right to propose rate changes, it is bound to the contract rates absent a finding and order by the Federal Power Commission under Section 5 of the Act.

The second ground upon which the Court of Appeals for the Third Circuit sought to distinguish the *Tyler* Case from the *Mobile* Case was the statement quoted from the District Court's opinion in the *Tyler* Case that "plaintiff's concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, . . ." 215 F. 2d 883, 884, fn. 3.

Tyler Gas and City did not concede that the Commission could fix rates at variance with the contract rates in a proceeding under Section 4(e) of the

Natural Gas Act. All that they conceded was that, as a result of an appropriate hearing, i.e., a hearing under Section 5 of the Natural Gas Act, the Federal Power Commission could, if it first set aside the contracts, fix rates other than the contract rates. The imprecise language of the District Court is understandable since the hearing and argument before it were addressed solely to the prayer for a preliminary injunction preventing United from moving to lift the suspension of its increased domestic rates pending a determination of the legality of its filing under Section 4 of the Natural Gas Act. The City and Tyler Gas challenged the legality of that filing both in Docket G-2210 before the Federal Power Commission and in their complaint in the District Court. As the Court of Appeals for the Fifth Circuit correctly said, they insisted "that Section 4, subd. (d) and (e) of the Natural Gas Act do not authorize a natural gas company to increase rates fixed by contract solely by its own action in filing a new schedule with the commission; that this can be done only after a full hearing and determination that the contract rates are not in the public interest because unjust, unreasonable, or unlawful." 217 F. 2d 73, 77.

The third ground upon which the *Mobile* Case sought to distinguish the *Tyler* Case is that the former involved only industrial rates while the latter involved domestic rates, increases in which, unlike increases in industrial rates, can be suspended by the Federal Power Commission for a period of five months. The Court is correct if it meant to say that the issue in the *Tyler* Case on the application for a preliminary injunction concerned only domestic rates. It is incorrect if it meant to say that the City and Tyler Gas did not

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY, *Petitioner*,

v.

MOBILE GAS SERVICE CORPORATION and FEDERAL POWER COMMISSION, *Respondents*.

No. 31

FEDERAL POWER COMMISSION, *Petitioner*,

v.

MOBILE GAS SERVICE CORPORATION.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM BRIEF IN SUPPORT OF MOBILE GAS SERVICE CORPORATION FOR THE CITY OF TYLER, TEXAS AND TYLER GAS SERVICE COMPANY AMICI CURIAE

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MEMORANDUM BRIEF IN SUPPORT OF MOBILE GAS SERVICE CORPORATION FOR THE CITY OF TYLER, TEXAS AND TYLER GAS SERVICE COMPANY AMICI CURIAE

REASONS FOR FILING THIS BRIEF

This Memorandum Brief is filed in support of Mobile Gas Service Corporation pursuant to Rule 42(4) of the Revised Rules of the Supreme Court of the United States.

It is not the purpose herein to argue the issues before the Court on writ of certiorari. That has been well done in the Briefs of the parties. However, the Briefs contain much discussion of the case of *Tyler Gas Service Company and City of Tyler* v. *United Gas Pipe Line Company*, E. D. Texas, Civil No. 1662, affirmed, 247 F. 2d 73. Furthermore, the Court of Appeals for the Third Circuit referred, in its opinion in the *Mobile* case being reviewed, to the District Court's decision in the *Tyler* Case. *Mobile Gas Service Corp.* v. *F.P.C.*, 215 F. 2d 883, 884, fn. 3. It sought to distinguish the *Tyler* Case on three grounds, two of which are based on misunderstandings of fact and all of which are erroneous. Finally, there is pending before the Federal Power Commission a proceeding respecting the rates of United Gas Pipe Line Company for sales of both industrial and domestic gas to Tyler Gas Service Company. The resolution of the issues before this Court in the *Mobile* Case will have relevance and materiality in that proceeding.

For the foregoing reasons it seems appropriate to present to this Court a resumé of the proceedings in the *Tyler* Case before the Courts and the Federal Power Commission and to discuss briefly the basis upon which Tyler Gas and the City of Tyler submit that the Court of Appeals in the *Mobile* Case erred in distinguishing the *Tyler* Case.

THE RELATIONSHIP AMONG CITY, TYLER GAS AND UNITED

Tyler Gas Service Company is a public utility enfranchised by the City of Tyler, Texas, to distribute natural gas in the City. Tyler Gas, like Mobile Gas Service Corporation, purchases all of the gas it

distributes from the United Gas Pipe Line Company. These purchases are made pursuant to a contract first entered into between Tyler Gas and United on November 22, 1940. This contract was amended on May 29, 1946.

The amended contract reduced the rates paid United by Tyler Gas for gas sold for resale for both domestic and industrial use, and committed United not to increase those rates for a period of 10 years. The reasons for the rate reduction were that the franchise of Tyler Gas had expired in 1946 and the City was about to refuse to renew it because it had been informed that another distributing company could be organized to purchase and distribute gas at substantially lower rates.

As the District Court found in the *Tyler* Case, supra, the principal consideration supporting the amended contract was the granting of a new franchise by the City of Tyler to Tyler Gas for a period coincident with the term of the amended contract, 16 years. This franchise was granted by the City only after United expressly agreed in writing with the City to abide the amended contract for 16 years and further agreed to sell gas to the City on the basis provided in the amended contract in the event the City exercised its reserved right against Tyler Gas to acquire its properties. Memorandum Opinion unreported, reproduced at p. 106 et seq. of Record in No. 15,034 in United States Court of Appeals for the Fifth Circuit. The amended contract between United and Tyler Gas was duly filed with the Federal Power Commission and made effective pursuant to Section 4 of the Natural Gas Act.

THE PROCEEDINGS IN THE TYLER CASE

On June 24, 1953, by the same filing with the Federal Power Commission that raised Mobile's rates, Docket G-2210, United proposed increases in both its domestic and industrial rates to Tyler Gas. As in the case of Mobile, the proposed increases in industrial rates became effective on July 25, 1953. The proposed increases in domestic rates were suspended by the Federal Power Commission for the maximum statutory period of five months, but became effective December 25, 1953. A hearing was ordered pursuant to Section 4 (e) of the Natural Gas Act to determine the reasonableness of the proposed increases.

Both the City of Tyler and Tyler Gas intervened in the proceedings before the Federal Power Commission in Docket G-2210. Both of them challenged in their pleadings the legality of United's filing in violation of the amended contract between Tyler Gas and United and the contract between the City and United.

On December 8, 1953, after it had become evident that the issues raised by the City and Tyler Gas in the proceedings in Docket G-2210 would not be determined before the period of suspension expired; the City and Tyler Gas invoked the diversity jurisdiction of the United States District Court for the Eastern District of Texas in a suit for: "(1) a preliminary injunction to restrain United from putting [the domestic rates which had been suspended by the Federal Power Commission] into effect; (2) a judgment declaring the contracts to be in all things valid, subsisting, and enforcible; and (3) enjoining the defendant from proposing or making effective any rates and charges in excess thereof." 217 F. 2d 73, 74.

A hearing on the request for a preliminary injunction was held by the District Court on December 14, 1953. The specific purpose of the hearing and the scope of the issues considered were delineated in the opening statements of counsel. Record, p. 22 et seq. in No. 15,034 in the United States Court of Appeals for the Fifth Circuit. In his opening statement Thomas B. Ramey, counsel for Tyler Gas, stated "that the purpose and sole purpose of this proceeding is to invoke the jurisdiction of this Court of equity to issue a Preliminary Injunction enjoining the Defendant, United Gas Pipe Line Company, from taking any steps to make effective the proposed schedule of rates to be paid for gas sold by the United Gas Pipe Line Company to the Tyler Gas Service Company under existing contracts entered into between those two companies and also confirmed by contract between the United Gas Pipe Line Company and the City of Tyler, ..." Thereupon the Court said: "You want to reserve the status quo?", to which Mr. Ramey replied: "We ask the Court to reserve the status quo from and after the date of expiration of the present suspension order of the Federal Power Commission until such time as the Commission finally decides the issues. That, in substance, is our position."

Counsel for United, in his opening statement, pointed out that the increased industrial rate was then in effect and argued that the Federal Power Commission was an indispensable party if a decree requiring the industrial rate to be withdrawn were to be entered. In response to this Mr. Ramey stated, inter alia, that he recognized that since the industrial rate had already been made effective "we are pre-

termitted" from its consideration by the Court "in our application for temporary injunction." Whereupon the application for a Preliminary Injunction was tried, briefed and argued.

On December 23, 1953, the District Court issued a Memorandum Opinion not only denying the Preliminary Injunction, which was the subject of the hearing, but also dismissing the Complaint for failure to show grounds for equitable relief. The District Court's action was affirmed on appeal. *Tyler Gas Service Company* and *City of Tyler* v. *United Gas Pipe Line Company*, 217 F. 2d 73.

The opinions of both the District Court and the Court of Appeals contain language which the Federal Power Commission and United interpret in their Briefs in this Court as suggesting that United's filing under Section 4 of the Natural Gas Act was proper notwithstanding that it violated the terms of its contracts with the City and with Tyler Gas. However, it is clear that, reading the opinions in the light of the issues tried in the District Court, both Courts based their holding on the ground that the Federal Power Commission "is empowered under and in accordance with the terms of the [Natural Gas] Act to afford relief and that any relief due the plaintiff must be sought" from the Commission. 217 F. 2d 73, 77. Again, in discussing the opinion in the *Mobile* Case being reviewed by this Court, the Court of Appeals said that "we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to

give adequate relief"; and that the plaintiffs did not show grounds for equitable relief." 217 F. 2d 73, 78.

That the District Court and the Court of Appeals held only that the City and Tyler Gas had failed to exhaust their administrative remedies is fortified by the fact that, as both Courts knew, the issue of the legality of United's filing proposing increases to Tyler Gas, having been raised in the pleadings of the City and Tyler Gas in Docket G-2210 in the Federal Power Commission, was then pending before the Commission. This holding by both the District Court and the Court of Appeals being the law of the case, neither rehearing in the Court of Appeals nor certiorari from this Court was sought.

The issue of the legality of United's filing as to Tyler Gas is still pending before the Federal Power Commission. The proceeding in Docket G-2210 was in part terminated by Opinion and Order No. 277, issued by the Commission on November 2, 1954. However, that Opinion and Order specifically provided that the applicable domestic rates it prescribed be effective as to Tyler Gas under bond subject to refund, and that the proceedings in Docket G-2210 remain open for the purpose of determining the matters involved and issues presented by the Petitions to intervene of Tyler Gas and the City of Tyler. Opinion and Order No. 277 (Mimeo. p. 21), In Re United Gas Pipe Line Company.

THE DISTINCTIONS BETWEEN THE MOBILE CASE AND THE TYLER CASE DRAWN BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT

The grounds upon which the Court of Appeals for the Third Circuit sought to distinguish the *Mobile* Case from the *Tyler* Case are three. First it said that

challenge in their Complaint in the District Court the increase in the industrial rates. As has been seen, they did.

Be that as it may, the holding of the *Mobile* Case, i.e., that a natural gas company may not ignore its contract rates unless the Commission first determines that the contract rates are unreasonable, is applicable whether those rates be domestic rates subject to suspension or industrial rates not subject to suspension. Consideration of the rationale of the holding requires this conclusion. That rationale is that there is a difference in fact and law between a finding under Section 4 of the Natural Gas Act that a proposed rate is reasonable, a finding that does not imply that the proposed rate is the only reasonable rate, and a finding under Section 5 of the Act that an existing rate is in fact unreasonable.

This difference, a difference of great practical significance, is the root of the *Mobile* holding. This difference has the same practical significance whether the rate is an industrial rate or a domestic rate. The fact that proposed increases in domestic rates may be suspended for five months and thereafter collected subject to refund pending a determination of reasonable rates under Section 4 of the Act is obviously not in any sense a substitute for the requirement that contract rates may not be set aside unless first found to be unreasonable. In the event of a refund the buyer from a natural gas company receives not the difference between the suspended rate and his contract rate but only the difference between the suspended rate and whatever rate less than the suspended rate is found to be reasonable. Thus he is still deprived of his contract rate without a prior, indeed without

any finding that his contract rate is unreasonable. It is this finding that it is submitted the *Mobile* Case correctly holds must precede the abrogation of his contract.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 434

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION and
FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION and
FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION, IN OPPOSITION

Opinion Below

Since the filing of the Petition the opinion of the Court of Appeals for the Third Circuit, printed in the Appendix to the Petition (App. 1-16), has been reported at 215 F. 2d 883.

Respondent's Statement of the Case

The relevant facts are fully set forth in the opinion below (215 F. 2d at 884-5, App. 1-4). Briefly, in 1946 Petitioner, United Gas Pipe Line Company (United), entered into a contract to sell gas to respondent, Mobile Gas Service Corporation (Mobile), for resale by it to Ideal

Cement Company for a period of ten years at a rate substantially lower than that fixed by United's existing rate schedule (R. 13-14). In reliance upon this contract, which was duly filed with the Federal Power Commission (Commission), Mobile entered into a contract of resale with Ideal. The Court of Appeals said: "* * * there seems no doubt but that the Ideal Cement account represented important new business to Mobile and to United and that the long range price concession was made in order to obtain it", 215 F. 2d at 889, App. 11). In 1953, United filed with the Federal Power Commission a schedule of proposed rate increases, including an increase in the contract rate (R. 15). The Commission by order denied Mobile's petition that this filing be rejected as unlawful (App. 18-23). As a result, the increase became effective without any hearing as to the reasonableness of the contract, and Mobile has been compelled to pay United 14.5¢ per MCF (the new rate) for gas which it is compelled under its contract with Ideal to resell for 12¢.[1] The Court of Appeals for the Third Circuit reversed the Commission's order, Hastie, J., dissenting. Petitioner asks this Court to review that decision.

The Question Presented

The issue is succinctly stated at the beginning of the opinion below: "In this proceeding to review an order of the Federal Power Commission the basic question is whether the Commission is correct in holding that under the Natural Gas Act a natural gas company can in effect wipe out a filed rate contract simply by filing an increased rate schedule. Substantially that is what the

[1] A rate contract is valid and binding under the laws of the State of Alabama. See *Birmingham Elec. Co. v. Alabama Public Service Commission*, 233 Ala. 675, 173 So. 19 (1937).

Commission considers to have happened to petitioner's contract with intervener" (215 F. 2d at 884, App. 1).

Of course, if such a contract as that here in issue can be wiped out by the unilateral filing of an increased rate, it means that any such contract is *nudum pactum* and void. Thus the issue resolves itself into a simple question of statutory construction: Did the passage of the Natural Gas Act automatically abrogate the right to enter into private rate contracts, or did it expressly delegate to the Federal Power Commission the power to abrogate such contracts after a hearing and finding that the public interest so required?

Argument

Private rate contracts, like any other private property rights, are subject to the paramount power of the State or Federal Government to abrogate or modify them when the public interest so requires. This power may be exercised directly by the legislature itself (*Armour Packing Co.* v. *United States*, 209 U. S. 56, 28 S. Ct. 428 (1907)), or the legislature may delegate the power to an administrative body (*Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, 43 S. Ct. 51 (1922)). When the legislature delegates the power to an administrative body, it can only be exercised in accordance with the standards and subject to the limitations prescribed by the legislature. Indeed, the legislature may not delegate such a power without prescribing standards governing its exercise, for that would be an unconstitutional delegation of legislative power (*Wichita R. R.* v. *Pub. Util. Comm.*, *supra*).

It is our contention, sustained by the Court below, that when Congress adopted the Natural Gas Act it did not thereby directly exercise its power to abrogate contracts, but, on the contrary, expressly delegated that power to the Federal Power Commission, to be exercised by it only

after a hearing and finding upon substantial evidence that the public interest required such modification.

I. Section 5(a) of the Gas Act is a clear delegation of power to the Federal Power Commission to abrogate or modify any rate contract upon a hearing and finding that it is unjust, unreasonable, unduly discriminatory, or preferential.

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, 52 Stat. 821 *et seq.*; 15 U.S.C. §§717 *et seq.*; as amended) are Sections 4 and 5, which are set forth in full in the Appendix to the Petition (App. 24-7). Section 5(a) provides in part as follows:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate * * * or *contract* affecting such rate * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate * * * or *contract* to be thereafter observed and in force, and shall fix the same by order * * *." (Italics supplied.)

The only possible interpretation of this provision is that it constitutes an express delegation by Congress to the Federal Power Commission of the power to set aside or modify contracts after a hearing and finding that they are unjust, unreasonable, etc., and to fix just and reasonable contract provisions in lieu thereof. It requires no citation of authority to establish the proposition that when Congress uses the word "contract" it means a contract in the legal sense: an agreement binding upon both parties thereto. Surely Congress cannot be deemed to have used the word "contract" to describe a piece of paper denominated a "contract" which is in fact void and unenforceable.

If the Act were construed as automatically abrogating all rate contracts, this provision would be meaningless. It follows that a duly filed rate contract such as that here in issue is valid and binding until and unless set aside after a hearing and finding as provided in Section 5(a). And so the courts have repeatedly held. See cases cited at pages 9 and 10, *infra*.

II. The provisions of Section 4 neither obligate nor authorize a gas company to initiate changes in violation of a contract.

Petitioner bases its attack on the decision below largely on the proposition that as it reads the statute, "* * * the natural gas company is obligated to initiate rate changes for Commission consideration pursuant to Section 4(d) whenever and as often as necessary to meet the obligation of Section 4(a) that all rates at all times shall be 'just and reasonable'" (Pet. 8-9). Petitioner argues from this premise that a natural gas company has no power to enter into a contract which would prevent it from carrying out its alleged obligation to initiate rate changes under Section 4(d) (Pet. 9, 19).

We see nothing in Sections 4 or 5, nor elsewhere in the Act, which imposes any obligation on a natural gas company to initiate rate changes in violation of a duly filed rate contract. The only obligation placed upon the company is to file schedules of all existing rates and contracts, as provided in Section 4(c). The provision relied on by Petitioner in 4(d) is cast in words of prohibition, and not of obligation:

> "Unless the Commission otherwise orders, no change shall be made by any natural gas company in any such [i.e., filed] rate, * * * or in any * * * contract relating thereto, except after thirty days notice to the Commission and to

> the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the changes or charges to be made in the schedule or schedules then in force * * *." (App. 25)

We do not see how this language can possibly be construed as imposing an obligation on a natural gas company to initiate changes in a contract rate. It merely forbids a filed rate schedule or contract from being changed without due notice to the Commission and to the public, and is followed by the provisions of Section 4(e) providing for hearings as to the reasonableness of the proposed change, suspension pending hearings, posting bonds, etc.

As was held by this Court in *Wichita R. R. v. Pub. Util. Comm.*, 260 U. S. 48, 43 S. Ct. 51 (1922), in holding that a contract rate could not be increased by a mere filing under a very similar provision contained in the Kansas Public Utility Law, such a provision "* * * is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules" (260 U. S. at 56-7). Obviously, the requirement in Section 4(c) that all existing schedules and contracts shall be filed would be futile, if private parties could change the filed rates at any time by secret agreement. But surely this provision cannot be tortured into either imposing an obligation on, or even authorizing, a utility company to abrogate its solemn contractual obligations by merely filing a schedule of higher rates. As held by this Court in the recent case of *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U. S. 239, 74 S. Ct. 487 (1954), in overruling the Commission's contention that the Federal Water Power Act abolished preexisting water rights:

> "* * * To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose. We find none." (347 U. S. 239 at 252-3)

Nor do we find any such explanation in the Gas Act.

Moreover, we think the provisions of Sections 4(c) and (d) were written into the Gas Act for the express purpose of differentiating it from the provisions of the Elkins Act, which was construed by this Court in *Armour Packing Co. v. United States*, 209 U. S. 56, 28 S. Ct. 428 (1907), as outlawing all private unfiled rate contracts for the transportation of goods in interstate commerce. In support of this determination this Court there pointed out:

> "* * * *There is no provision* [in the Interstate Commerce Act] *for the filing of contracts* with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart." (209 U. S. 56 at 81) (Italics supplied.)

In discussing Armour's suggestion that as a matter of policy rate contracts should not be outlawed the Court said:

> "It may be that such contracts should be recognized, giving stability to rates for limited periods; *that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done.* But, as we have said, such considerations address themselves to Congress, not to the courts." (209 U. S. 56 at 82) (Italics supplied.)

We suggest that such considerations did address themselves to Congress when, in drafting the Natural Gas Act, it departed from the provisions of the Interstate Commerce Act and expressly provided that all contracts, and all proposed changes in contracts, should be filed and published, so that the rate stipulated would be known and open to all. The reason for this differentiation is that in the gas industry sales of gas for industrial use are "in direct competition with other forms of fuel."[2] Unless binding long term contracts at fixed rates may be entered into, it would be impossible for the gas industry to compete with other sources of industrial power.

III. As construed by the Court below, the Natural Gas Act sets forth a clear and simple scheme of regulation, which is supported by the overwhelming weight of authority.

We submit that the regulatory scheme set forth in the Act, as construed by the Court below, in so far as it relates to such a rate contract as the one here in issue, is clear and simple. Moreover, a consideration of that scheme conclusively refutes Petitioner's contention that the Court's decision places contracts beyond the reach of the regulatory powers of the Commission. On the contrary, the Act provides that any rate contract shall be twice subjected to regulatory action by the Commission: First, under Section 4(e) at the time that it is filed, and secondly, under Section 5(a) at any time thereafter. By way of illustration: In 1946 when the contract was filed under Section 4(d) it could have been set aside by the Commission after a hearing under Section 4(e) if found to be discriminatory or otherwise unlawful. The Commission having permitted it to become effective without

[2] Vol. 81, Part 6, 75th Congress, 1st Session, p. 6725; Congressional Record July 1, 1937.

a hearing, the contract became the legal filed rate, which because it was embodied in a contract could thereafter be changed in either of two ways: (1) By agreement of the parties, in which event the proposed change must be filed under Section 4(d), subject again to the power of the Commission to reject or modify it after a hearing and finding of unreasonableness under Section 4(e); or (2) by the Commission after a hearing under Section 5(a), and a finding that the contract is so unjust, unreasonable, unduly discriminatory or preferential that the public interest requires that it be set aside. Thus the contract is at all times subject to the control of the Commission, and there is no reason why the public utility should have the right to abrogate its own contract unilaterally.

That the foregoing is the correct construction of Sections 4 and 5 of the Natural Gas Act is abundantly apparent from the controlling cases cited in the opinion below, in each of which the court construed the Natural Gas Act or a similar statute as not automatically overthrowing rate contracts, but rather as delegating to the appropriate Commission the power to abrogate such contracts upon a finding that they are against the public interest:

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48 (1922);

Arkansas Natural Gas Co. v. *Railroad Commission*, 261 U. S. 379 (1923);

Southern Utilities Co. v. *Palatka*, 268 U. S. 232 (1925);

Hinkel Dry Goods Co. v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (10th Cir. 1933);

Colorado Interstate Gas Co. v. *Federal Power Commission*, 142 F. 2d 943 (10th Cir., 1944);

Attleboro Steam & Electric Co. v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (D.C.R.I. 1924);

Kaul v. American Independent Telephone Co., 95 Kan. 1, 147 Pac. 1130 (1915);

Railroad & Light Co. v. Court of Industrial Relations, 113 Kan. 217, 214 Pac. 796 (1923).

The inherent weakness in Petitioner's position is perhaps best illustrated by the fact that despite the formidable array of fifty-seven cases cited in the Petition it does not mention one of the foregoing cases, which are the only ones dealing directly with the question in issue, and each of which squarely refutes Petitioner's contentions.

Moreover, we submit that the fact that the courts have so repeatedly prescribed the procedure hereinabove outlined is the clearest proof of the lack of substance in Petitioner's repeated cries of distress at the alleged practical difficulties involved in carrying out that procedure.

That as recently as 1948 the Commission itself did not consider that rate contracts either interfered unduly with the Commission's performance of its regulatory functions, or that they were outlawed by the Act, is clear from the Commission's interpretation of the effect of its Order No. 144 issued October 30, 1948, which directed that all existing contracts and rate schedules be converted from a percentage to a dollars and cents basis, and to which Petitioner devotes so much attention in the footnotes on pages 4 and 5 of the Petition:

> "The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." (Federal Power Commission Order issued December 21, 1948, CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951 Decisions, ¶9090.)

IV. There is neither an inter-circuit nor an intra-circuit conflict with the decision here sought to be reviewed.

In its effort to persuade the Court to grant its writ Petitioner endeavors to show the existence of both inter-circuit and intra-circuit conflicts (Pet. 19-24). But the decisions cited by Petitioner (Pet. 19-20) as creating a conflict between circuits are clearly not germane to the question passed upon by the Court below. The decision of the Third Circuit in *Mississippi River Fuel Corp. v. Federal Power Commission*, 202 F. 2d 899 (1953), relied on as the source of the "intra-circuit" conflict (Pet. 21-4) is fully distinguished by the Court itself (245 F. 2d at 891-2, App. 15).

Since the foregoing was written the Court of Appeals for the Fifth Circuit has, on November 24, 1954, decided Case No. 15,034, *Tyler Gas Service Company and The City of Tyler, Texas, appellants, versus United Gas Pipe Line Company, appellee*,[a] and counsel for Petitioner has stated that he proposes to file a reply memorandum contending that this decision is "squarely in conflict" with the decision here sought to be reviewed.

The short answer to any such contention is that the *Tyler* case was commenced as a collateral proceeding brought in the District Court to enjoin United, the present Petitioner, from taking certain action before the Commission in violation of its contract with Tyler. The Commission was not even made a party to that proceeding. As we read the opinions, both of the Fifth Circuit and of the District Court, the burden of those decisions is that the appellants have failed to exhaust their remedies before the Federal Power Commission. With this we are in-

[a] The opinion is printed as an Appendix to this brief (*i.e.*, Resp. App.).

clined to agree. It seems to us that the proper procedure for the appellants in the *Tuler* case was, and still is, to petition the Commission to reject the filing on the ground that it is in violation of the appellants' contract rights, as the present Respondent, Mobile, did in the instant case, and to resort to the courts only if that petition is denied.

That the Fifth Circuit did not intend to disagree with the decision here sought to be reviewed is apparent from the concluding paragraphs of its opinion commenting on that decision:

> "Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief': * * *." (Resp. App. 9a-10a)

No doubt petitioner will emphasize the statement of the Fifth Circuit that:

> "We find ourselves, * * * in agreement with the well considered and expressed views of the district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high, they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission." (Resp. App. 8a)

We quite agree that a private contract fixing rates so high that they would penalize the consumers affected or so low

as to jeopardize the company's ability to serve the public would be in violation of the requirement of Section 4(a) that all rates "shall be just and reasonable". We think it is also apparent from what has been said heretofore that in such a situation the Commission has not only the power, but the duty, after a hearing either under Section 4(e) at the time the contract is filed, or under Section 5(a) at any time thereafter, and a finding that the contract rate will produce such results, to set it aside. But in any event, this statement of the Court of Appeals for the Fifth Circuit in the *Tyler* case is clearly a mere dictum.

We see no conflict between that decision and the decision here sought to be reviewed.

V. Petitioner's contention that the Court below erroneously construed the Commission's power to make refunds under Section 4(e) is not even presented on this record.

Petitioner's contention that the Court below improperly holds that the Commission has power under Section 4(e) to order reparations or refunds would seem to fly squarely in the face of the clear statement in the opinion below that this question was not reached for the reason that:

> . . . Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile." (215 F. 2d at 892, App. 16)

CONCLUSION

The decision sought to be reviewed is so clearly in accordance with the plain language of the statute and with the controlling authorities that the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM C. CHANLER,
Attorney for Respondent,
Mobile Gas Service Corporation.

SAMUEL M. JOHNSTON,
DAN T. MCCALL, JR.,
ELLIOTT E. VOSE,
GERARD THOMAS.

December 4, 1954.

APPENDIX

(Opinion of the U. S. Court of Appeals for the Fifth Circuit)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15034

TYLER GAS SERVICE COMPANY and THE CITY OF TYLER, TEXAS,

Appellants,

versus

UNITED GAS PIPE LINE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(November 24, 1954.)

Before—HUTCHESON, Chief Judge, and BORAH and RIVES, Circuit Judges.

HUTCHESON, Chief Judge: Alleging that United Gas Pipe Line Company, a "Natural Gas Company", was under binding term contracts as to rates with the City of Tyler and the Tyler Gas Service Company, the operators of a system for the local distribution and sale of gas and the holder of a gas franchise from the city, and that, in

violation of their express covenants, it had filed with the Federal Power Commission and was proposing, at the end of the suspension period, to put into effect a schedule of higher rates. Tyler and Tyler Gas filed this suit seeking: (1) a preliminary injunction to restrain United from putting the schedule into effect; (2) a judgment declaring the contracts to be in all things valid, subsisting, and enforcible; and (3) enjoining the defendant from proposing or making effective any rates and charges in excess thereof.

The defendant moved for a dismissal of the complaint for want of jurisdiction and for want of equity and failure to state a claim because it in effect seeks to enjoin compliance by the defendant with the provisions of the Natural Gas Act,[1] and more particularly Section 4 thereof,[2] and because it in effect bases its claim to declaratory and injunctive relief upon the theory and contention that the contracts relied on override and nullify the duties, powers, obligations and procedures imposed and conferred by the act on defendant as a natural gas company under the Act, indeed override the provisions of the Act itself. In addition, it moved for a dismissal as to the City of Tyler for the reason that the city was not a party to the

[1] 15 U.S.C., Chapt. 15B, Sec. 717 to 717w.

[2] "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 15 U.S.C.; Sec. 717c(d).

contracts and had no capacity to sue on or in respect of them, and filed a lengthy answer, which, because of the manner in which the case went off, it is not necessary to here set out.

The matter thereafter coming on for hearing on the application for preliminary injunction, the district judge filed a carefully worded opinion in which, summing up the facts, as to which there is no serious dispute, and

[a] "The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½c per thousand cubic feet for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion, and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½c to 12c Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12c from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2c for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was, on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be

discussing the applicable law, he held: that federal jurisdiction existed by reason of diversity and jurisdictional amount; that United is a natural gas company subject to the act; that being such it cannot by private contract fix binding long term future rates; and that plaintiffs must,

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charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

"During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

"About July 1, 1952, United filed with the Commission a schedule of rates (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff [so called because it converted United's schedule of rates from contract to tariff form as required by rules of the Commission], United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

"Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with the customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

"On June 24, 1953, United filed with the Commission another revision of its schedule or rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an

consistent construction and practice. It raises questions of importance to future administration and regulation under the Natural Gas Act. We intend, substantially before February 4, 1955, the date to which the time has been extended for a petition by the Government, to file a petition for a writ of certiorari on behalf of the Commission seeking review by this Court of the judgment of the Third Circuit. For these reasons, we urge this Court to grant the instant petition for a writ of certiorari.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

WILLARD W. GATCHELL,
General Counsel
Federal Power Commission.

DECEMBER 1954.

therefore, seek such relief as they may be entitled to under the statute from the commission and not from the court.

So holding, he denied the preliminary injunction and dismissed the bill for want of equity, and plaintiffs have appealed.

Here, while conceding that the commission on final hearing may fix reasonable rates lower than the contract fixes them, appellants insist: that unless and until the contracts sued on are set aside for some invalidity, or after a hearing before the Federal Power Commission, the contract rates are found by the commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with lower rates.

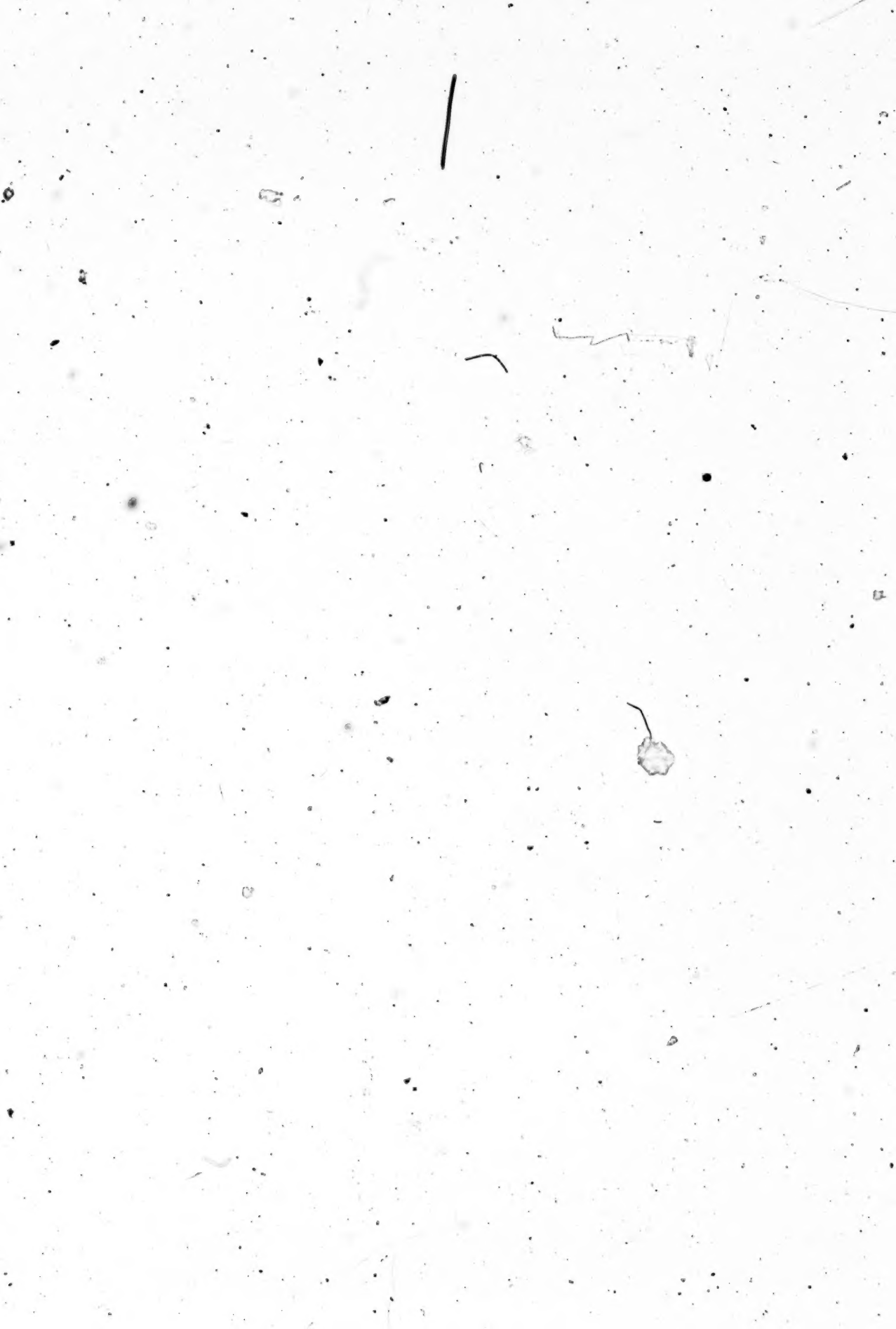
In support of their view, that this cannot be done and that the court erred in denying the preliminary injune-

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increase of some 70% over and above the rates fixed by the contract amendment of 1946.

"Upon the filing of the new proposal, by order of July 10, 1953, the Commission set a hearing for July 20, 1953, to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, 'In the Matters of United Gas Pipe Line Co.') in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until Dec. 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4(e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expired Dec. 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953.

* * *"



tion and dismissing the complaint for want of equity, appellants, in eight specifications of error,[4] which ring the changes on what it claims is the fundamental error of the trial court, attack its holding that a public utility company may, by the simple expedient of filing a revised schedule with the Federal Power Commission, without a full hearing before and a finding by the Commission that such contract rates are unjust, unreasonable, or unlawful, disregard its solemn contracts fixing maximum rates.

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[4] "I. The Court erred in holding that the Defendant was not precluded by its contracts with plaintiffs from invoking the provisions of the Natural Gas Act to increase gas rates provided in such contracts, in advance of a full hearing and final determination by the Federal Power Commission;

"II. The Court erred in refusing to enjoin Defendant from taking steps permitted by the Natural Gas Act to make effective increased gas rates charged Plaintiff Tyler Gas Service Company, in advance of a full hearing and final determination by the Federal Power Commission;

"III. The Court erred in holding that the provisions in the contracts between Plaintiffs and Defendant fixing maximum rates for gas were subject to abrogation, even though no proof was made that same was in the public interest;

"IV. The Court erred in holding that the Defendant was authorized under the Natural Gas Act by unilateral action to increase gas rates charged Tyler Gas Service Company in contravention of the contracts between Plaintiffs and Defendant;

"V. The Court erred in refusing to enjoin Defendant from violating its contract with, and representation to, the City of Tyler that during a period of sixteen years Defendant would sell gas to Tyler Gas Service Company (or to the City of Tyler if it should acquire the property of said Company) at rates not in excess of stipulated maximum rates;

"VI. The Court erred in holding that by virtue of the provisions of the Natural Gas Act the Court was without power to grant the relief sought by Plaintiffs;

"VII. The Court erred in holding that only the Federal Power Commission is authorized to grant the relief sought by the Plaintiffs herein;

"VIII. The Court erred in dismissing the Complaint for failure to show grounds for equitable relief."

Moving forward under these specifications, and conceding that a contract fixing utility rates is deemed to have been made subject to the sovereign power of the government to alter it under proper circumstances; appellants insisting that it is not void but only voidable, quote from Corpus Juris Secundum, Vol. 73, pp. 1012-1013, where it is said:

> "Such a contract is, however, voidable only in that it can not stand against modification by competent authority; and it is obligatory on the parties until abrogated by the state, failing only when the rate is altered or a definite rate is fixed."

and from 43 Am. Jur. page 639:

> "Until the legislature or other body having the right to prescribe rates to be charged by public utilities has exercised this power, the rates are subject to contract between the corporation and its patrons, and such contracts will be deemed valid by the courts, and may be enforced by an appropriate mode."

Proceeding from the premises these contentions and citations supply, appellants insist: that Section 4, subd. (d) and (e) of the Natural Gas Act do not authorize a natural gas company to increase rates fixed by contract solely by its own action in filing a new schedule with the commission; that this can be done only after a full hearing and determination that the contract rates are not in the public interest because unjust, unreasonable, or unlawful.

Citing in support *Colorado Interstate Co. v. Federal Power Commission*, 142 F(2) 943, and insisting that nothing in Sec. 4, 4(e) and 5(a) of the Natural Gas Act is inconsistent therewith, the appellants urge upon us that the district judge erred in refusing interlocutory

equitable relief and in dismissing the bill for want of equity.

We do not think so. We find ourselves, on the contrary, in agreement with the well considered and expressed views of the district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected; or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission.

Based upon these views, he thought, as we do, that the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act.

So thinking, he rejected, as we reject, the plaintiff's view that the district court could and should grant the relief asked, (1) an injunction prohibiting United from proceeding under Section 4 of the Act, and (2) a decree in effect requiring it to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding.

By supplemental brief, appellants urge upon us that the decision and judgment of the court below, that plaintiffs could not resort to the courts for relief but were remitted to the remedies provided by and under the Natural Gas Act, was a holding in effect that the United can by purely unilateral action, disregarding indeed nullifying its current rates, initiate higher ones.

As the district judge correctly pointed out in his opinion, this is not a correct, it is an incorrect, characterization of United's action in filing its schedule. Saying, "The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates.", the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme. So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the court cannot do.

Finally, attaching to their supplemental brief a copy of the opinion of the Court of Appeals for the Third Circuit, in *Mobile Gas Service Co.* v. *Federal Power Commission* (Filed 9-7-54), appellants invoke as authority for their contention below and here, the majority opinion of that court holding that, under Section 4(d) of the Act, "The commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the contract rates."

Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that "Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of

this court. The commission is amply empowered to give adequate relief."; and that the plaintiffs did not show grounds for equitable relief.

The judgment appealed from is AFFIRMED.

A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

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No. 436 17

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

SIMON E. SOBELOFF,
Solicitor General, Department of Justice,
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

The petition for a writ of certiorari in this case seeks to bring before this Court for review the decision of the Court of Appeals for the Third Circuit, holding that the Natural Gas Act does not authorize the Federal Power Commission to permit petitioner to increase its rates for the sale of natural gas for resale for industrial use prior to a determination by the Commission, after hearing, that petitioner's existing contract rate for such sales to Mobile is unreasonable.

This decision of the Court of Appeals is, we believe, contrary to the clear language of the Natural Gas Act as well as the Commission's

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FILED
SEP 26 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION and FEDERAL POWER COMMISSION,

Respondents.

No. 31

FEDERAL POWER COMMISSION,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION and FEDERAL POWER COMMISSION,

Respondents.

No. 31

FEDERAL POWER COMMISSION,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION

Questions Presented

1. Whether a contract to sell natural gas at wholesale at a special low rate for a fixed period of years which has been accepted for filing as the legal rate by the Federal Power Commission is binding upon the parties until and unless abrogated by the Federal Power Commission after a hearing and finding that it has become unreasonable and

against the public interest, or whether such a contract may be abrogated at any time by the selling company itself by the mere filing of a schedule of higher rates.

As presented by petitioners' briefs herein it is apparent that the answer to the above ultimate question depends upon the answer to the following immediate question: Whether Congress, in enacting the Natural Gas Act (a) declared all private rate contracts for the sale of natural gas to be against public policy and unenforcible, as contended by petitioner United Gas Pipe Line Company; (b) recognized duly filed private rate contracts as valid and binding but delegated its power to abrogate them to the natural gas company itself, as well as to the Federal Power Commission, as contended by petitioner Federal Power Commission; or (c) delegated its power to abrogate private rate contracts exclusively to the Federal Power Commission after a hearing and finding that the contract is against the public interest, as contended by respondent, Mobile Gas Service Corporation.

2. Whether, if Congress delegated its power to abrogate duly filed private rate contracts exclusively to the Federal Power Commission, that Commission can accept for filing and permit to become effective a proposed schedule filed by a natural gas company under Section 4(d) of the Act which increases the contract rate without the consent of the purchaser, in the absence of any hearing or finding that the contract rate is unreasonable and against the public interest.

3. Whether or not the increased rates illegally collected by a natural gas company pursuant to such a filing must be refunded to the purchaser.

Statement

The pertinent facts upon which the present controversy is based are fully and accurately set forth in the "statement" in the brief submitted by the Solicitor General.[1] To avoid needless repetition we will confine ourselves here to a brief outline of what we believe are the salient ultimate facts.

Respondent, Mobile Gas Service Corporation (Mobile), is a public utility under the laws of the State of Alabama. It purchases natural gas at wholesale from petitioner, United Gas Pipe Line Company (United), and distributes and sells it at retail to domestic and industrial consumers in Mobile, Alabama and the surrounding area (R. 8-9). Its purchases from United have at all times been made pursuant to a series of contracts specifying the rate which Mobile should pay for gas during the term of the contract (R. 9). The underlying contract was entered into by Mobile with a predecessor to United on January 1, 1936 (R. 81-86). After the enactment of the Natural Gas Act in 1938 this contract was duly filed with the petitioner Federal Power Commission (Commission) (R. 9). Until the attempted increase which forms the basis of the present litigation, no changes were made in such contracts without the consent of Mobile (R. 86-88, 88-90, 90-95).

The contract in existence in 1946 provided that United would supply Mobile's entire requirements of gas for industrial use at a rate of 90% of Mobile's gross revenues from its resales, provided this return was not less than 16¢ per MCF unless United agreed in writing to accept a lesser return (R. 9, 87).

In 1946 the Ideal Cement Company (Ideal) proposed to establish a cement plant in the City of Mobile, provided

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1. Commission's Brief, pp. 2-8. Hereinafter the Commission's Brief will be cited as "C. Br. p. ," and United's Brief as "U. Br. p. "

it could obtain a supply of natural gas for a ten-year period at a fixed rate of 12¢ per MCF (R. 9, 12, 39-40). This would have produced a return to United of less than 16¢ per MCF under the existing percentage agreement. Accordingly, in compliance with its contract, Mobile advised United of this proposal and requested its consent to the proposed low rate (R. 90-95). On July 30, 1946 United agreed in writing to supply Mobile with gas for resale to Ideal at a flat rate of 90% of its gross revenues, even though the resulting return would be less than 16¢ per MCF (R. 95). In reliance thereon, United entered into a contract to supply Ideal with natural gas for a period of ten years at a fixed rate of 12¢ per MCF (R. 90-95, 39-40).

In July 1952 the Federal Power Commission permitted a new tariff converting United's filed schedules and contracts from a percentage to a dollars and cents basis to become effective (R. 60). This so-called "conversion tariff" provided that sales to Mobile for resale to Ideal would be at a flat rate of 10.7¢ per MCF, which was precisely the amount of return which it had previously received under the pre-existing percentage rate. Thus, as recently as 1952, United was meticulous in honoring its contract obligations to Mobile.[2]

On June 24, 1953 United filed with the Commission a schedule of increases for a number of its sales, including an increase from 10.7¢ to 14.5¢ per MCF in its rate to Mobile for gas sold for resale to Ideal (R. 1, 11, 66-67). On July 10 the Commission ordered a hearing as to the reasonableness of the proposed new rate (R. 66-70),

2. On the oral argument in the court below counsel for United conceded that this contract was entered into in good faith, all parties believing that it would be valid and binding in accordance with its terms. Counsel asserted that at that time they had negligently failed to "go to the books" but that now United has discovered that the contract was voidable at will by United (Trans. of Oral Argument, 3rd Cir., p. 75). Thus, at least until 1952, United itself construed the Gas Act as we do here.

but did not suspend the effective date of the proposed increase to Mobile on the ground that Section 4(e) of the Natural Gas Act (52 Stat. 822; 15 U.S.C. 717(c)(e)) forbade the suspension of a schedule filed by a natural gas company changing rates for resale for industrial use only (R. 67, 69, 14). Thus the new rate became effective thirty days after filing, *i.e.* on July 25, 1953, and between that date and April 15, 1955, when the contract was assigned to United (U. Br. 7, fn. 5) Mobile has been compelled to pay 14½¢ per MCF to United for gas which it was obligated under its contract with Ideal to resell to it for 12¢ per MCF.

On July 16, 1953 Mobile filed its petition to intervene in the proceedings before the Commission (R. 70-72). On August 4, 1953 Mobile filed an amended petition (R. 7-18) requesting that the Commission's order of July 10 permitting the increase to go into effect as of July 25 be amended so as to reject the filing of the proposed increase to Mobile for resale to Ideal on the ground that it was in violation of United's contract with Mobile and therefore unlawful (R. 11-13, 17). Mobile also requested that if the Commission refused to reject United's filing, it order a hearing solely as to the lawfulness of such filing; that in addition it order United to repay to Mobile any part of the increased rates which might ultimately be found to be illegal (R. 17-18).

United filed a petition for leave to intervene and answer (R. 22-31). On December 7, 1953 the Commission issued an order which granted United leave to intervene but denied all of the relief requested by Mobile, dismissed Mobile's petition, and terminated the proceeding (R. 1-6). Mobile petitioned for a review of this order to the Court of Appeals for the Third Circuit.

The Commission's order was reversed by the Third Circuit on the ground that United was bound by its con-

tract with Mobile until and unless the Commission found after a hearing under Section 5(a) of the Act that the contract was unreasonable and against the public interest, that therefore United's attempt to increase the contract rates by a mere filing under Section 4(d) was unlawful, and that the filing should have been rejected by the Commission (215 F. 2d 883 (1954), R. 155-156, 139-155). This is an appeal by United and the Commission from that decision.

United's "statement" seeks to raise an additional issue that is not properly before the Court. It argues that compliance in 1952 with the order issued by the Commission requiring all natural gas companies to submit the conversion tariff above referred to (F.P.C. Order No. 144, issued October 30, 1948) in some manner affected the continuing validity of the contract (U. Br. pp. 5, 6). This contention was not raised before the Commission. Moreover, it is based on certain documents which were not a part of the record upon which the order under review was entered. United sought to have these documents added to the record by motion addressed to the Court of Appeals for the Third Circuit (R. 111-123), but that motion was denied (R. 139). Nevertheless, United saw fit to print some of these documents in an Appendix to its brief before the Third Circuit and they are included in the Record before this Court. It is respectfully submitted that neither those documents nor the issue based upon them are now properly before this Court.

In any event, we should like to point out that United's contention is directly contradicted by the Commission's own interpretation of the effect of its so-called conversion order:

> "The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." (Federal Power Commission Order issued December 21, 1948, CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951 Decisions, Par. 9090.)

As the Solicitor General's brief correctly points out, the only effect of compliance with this "conversion order" was to change the rate which Mobile was obligated to pay United for the gas purchased for resale to Ideal from a percentage basis to the equivalent dollars and cents basis (C. Br. p. 4).

SUMMARY OF ARGUMENT

1. Unquestionably, Congress may abrogate private rate contracts when necessary in the public interest. This power may either be exercised by Congress itself, or it may be delegated by Congress to an administrative body, to be exercised in accordance with such standards as Congress may prescribe.

(a) In enacting the Interstate Commerce Act, Congress exercised this power itself by outlawing all rate contracts between carriers and shippers or passengers. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 428 (1908). The reason assigned by this Court for holding that the Act outlawed contracts was that the filing provisions in the Act nowhere provide for the filing or publication of rate contracts. The word "contract" is not even mentioned in the filing provisions of that Act. By contrast, in enacting the Natural Gas Act Congress not only provided for the filing of all "contracts" (Section 4(c)) and of all changes in "contracts" (Section 4(d)), but expressly delegated to the Federal Power Commission the authority to abrogate existing "contracts" if they are

found after hearing to be unreasonable or unduly discriminatory or preferential (Section 5(a)). Thus it is apparent from the language of the Act itself that Congress did not outlaw rate contracts in the gas industry, but delegated its power to do so to the Federal Power Commission, on a finding that the public interest so required.

(b) The reason for the difference between the two Acts lies in the difference between the nature of the industries being regulated. As is conceded by both petitioners and was recognized by Congress, contracts are necessary in the natural gas industry because large investments or commitments must be made by industrial consumers and local distributing companies before their facilities can be converted to the use of natural gas. No such considerations apply in the railroad industry where the primary purpose of regulation is to prevent secret rebates and similar evils by compelling carriers to offer the same services at the same rates to all. The primary object of rate regulation in the utility field, on the other hand, is to obtain the lowest available rates for the consuming public.

(c) While United insists that the two acts are identical, the Solicitor General concedes that because of the difference in language and in the nature of the industries being regulated, the Natural Gas Act does not automatically outlaw rate contracts, but recognizes them as being "as valid, lawful and enforceable as they have always been" (C. Br. pp. 32, 52, 53).

(d) Nevertheless, both petitioners contend that Section 4(d) of the Gas Act authorizes a natural gas company, as distinguished from the Commission, to increase a contract rate by merely filing a new rate schedule. This contention is refuted by a mere reading of that section:

* * * * no change shall be made by any natural gas company in any * * * contract * * * except after thirty days notice to the Commission and to the public", to be given by filing with the Commission a schedule showing the changes to be made. Thus this section merely prohibits parties to a contract from changing the contract rates without notice to the Commission or to the public. It cannot be tortured into an affirmative grant of power to one of the parties to the contract to abrogate it unilaterally. If it had this effect, it would mean either that such contracts were void *ab initio* for lack of mutuality, or that Congress had delegated its power to abrogate contracts to one of the parties to the contract.

(e) Petitioners' contentions are based upon a misconception of the nature of the "filed rate procedure" embodied in the Act. A "reasonable rate" is not a fixed mathematical point, but a zone bounded at the top by a rate which will produce a fair return to the company on its investment. While the Commission may not impose a lower rate upon a company, the company is under no obligation to maintain the maximum rate permissible by law. The lower boundary of this "zone of reason" is the lowest rate at which the company offers to serve its customers, provided such rate is neither unduly discriminatory or preferential. Any rate filed by a company, whether embodied in a contract or in a unilateral rate schedule, which falls within this zone must be accepted by the Commission under its duty to approve "the lowest reasonable rates" (5(a)). If such a rate later becomes either exorbitant or unduly discriminatory or preferential, the Commission as the guardian of the public interest may hold hearings either upon the complaint of a party injured by the existing rate, or on its own motion, under Section 5(a). If upon such a hearing the rate is found

to be injurious to the public interest, it must be set aside by the Commission. And this is so regardless of whether or not the rate is embodied in a contract. Thus the public interest is amply protected against unreasonable or otherwise injurious contracts. But an existing rate may not be set aside under 5(a) as long as it remains within the "zone of reason". It is thus apparent that the existence of private rate contracts can in no way interfere with a proper exercise of the regulatory powers of the Commission as prescribed by the Gas Act.

2. It follows from the foregoing that a natural gas company may not file a schedule of increased rates under Section 4(d) when the existing rates are embodied in a contract, without the purchaser's consent. If it could do so, it would have the power to abrogate its contract unilaterally without any finding that it was injurious to the public interest. Consequently, the Commission must reject such a filing. For if such a filing is not rejected by the Commission, it automatically becomes the "legal rate" and cannot thereafter be set aside unless the *new* rate itself is found after a hearing under Section 4(e) to be exhorbitant or otherwise unreasonable. If the new rate is within the "zone of reason" it must be approved by the Commission even though the contract rate itself is also within the "zone of reason". For the Commission has no authority in a hearing under Section 4(e) to reject a rate accepted for filing under 4(d) except upon a finding that the *new* rate itself is unreasonable. The Commission may not consider the reasonableness of the existing rate on such a hearing. It follows that an attempt by a company to file a change in a contract rate without the consent of the purchaser must be rejected by the Commission as illegally filed. If the Commission does not reject the filing, there is no way to prevent the rate from becoming effective and thus permitting the company by its unilateral act to abrogate its own contract.

3. The issue is one of statutory construction and must be determined primarily from the language of the statute itself read in the light of the congressional purpose, rather than from cases arising under different statutes and in other jurisdictions. Nevertheless, so much space is devoted by petitioners to the citation and discussion of an aggregate of over 175 cases in an effort to show that the "overwhelming" weight of authority supports their contentions, that we believe it is necessary to discuss the authorities with some care, in order to demonstrate the utter fallacy of such a contention.

(a) An examination of the decided cases will show that the only time this issue has been squarely presented to this Court under a State statute containing filing provisions substantially similar to those contained in the Natural Gas Act it expressly rejected the proposition that a contract rate may be increased by a mere filing of a new schedule. *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48 (1922). Petitioners cite no cases which distinguish or in any way limit the application of this decision to the case at bar. Despite immaterial and minor differences in the statutes, the principles enunciated in that case are equally applicable to the Gas Act, and clearly support the contentions heretofore advanced. Moreover, those principles have been expressly applied to the Natural Gas and Federal Power Acts by the Courts of Appeal in the Third, District of Columbia, and Tenth Circuits.

(b) The decisions of this Court cited by petitioners are clearly distinguishable. The *Armour* case, *supra*, as well as many of the other cases cited, deal with the Interstate Commerce Act, which concededly outlawed all rate contracts in the railroad industry and therefore have no application here. *Union Dry Goods Co.* v. *Georgia Public*

Service Co., 248 U. S. 372 (1919), cited as "controlling" in the brief submitted by United, merely upholds the right of the State Commission of Georgia to set aside contracts upon a finding, after a hearing, that they are discriminatory or preferential. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109 (1937), relied on by both petitioners, sustains the proposition that, because the Supreme Court of Missouri has held that rate contracts in the utility business are unconstitutional in Missouri, rates embodied in such a contract may be changed by a mere filing of a new rate schedule. Thus it has no more bearing on the present issue than the *Armour* case.

(c) An examination of the cases arising under State utility statutes shows that they fall into two groups: those dealing with statutes that have been construed by the State Courts as automatically outlawing rate contracts, as does the Interstate Commerce Act, and those which recognize the validity of contracts under the state statute. The former are irrelevant. Of the latter, only two have been construed as permitting a contract rate to be changed by a mere filing of a new rate schedule. The great majority follow the principles enunciated by this Court in the *Wichita* case and expressly reject the contention that a rate contract can be changed by the mere unilateral filing of a new rate schedule.

(d) An examination of the Commission's past practices shows that, except in the instant case and the *Sierra* case, the Commission has consistently permitted contract rates to be changed only after a finding of unreasonableness after a hearing under Section 5(a).

4. There is no merit to United's contention that it should be permitted to retain the excess charges illegally collected from respondent.

ARGUMENT

I

Private rate contracts are recognized by the Natural Gas Act and are valid and binding as between the parties unless and until set aside by the Federal Power Commission after a hearing and finding under Section 5(a) that they are unreasonable.

No citation of authority is required to establish the proposition that private rate contracts are subject to the paramount power of government to regulate all rates. Like any other private contracts, they may be modified or abrogated by the Federal or State Governments when the public interest so requires. Nor is the citation of authority required to establish the proposition that this power may be exercised in only two ways: (1) by the legislature itself acting directly, as in the Interstate Commerce Act (*Armour Packing Co.* v. *United States*, 209 U. S. 56, (1907)), or (2) by an administrative body to which the legislature has delegated the power, as in the Public Utility Law of the State of Kansas (*Wichita R.R.* v. *Pub. Util. Comm.*, 260 U. S. 48 (1922)). Moreover, when the legislature delegates the power to an administrative body, it can only be exercised in accordance with the standards and subject to the limitations prescribed by the legislature. Indeed, the legislature may not delegate such a power without prescribing standards governing its exercise (*Wichita R.R.* v. *Pub. Util. Comm.*, 260 U. S. 48, at 59).

The present controversy arises primarily from a failure of the petitioners to bear these basic principles and distinctions in mind in construing the Natural Gas Act. United insists that there is no difference whatever between the Interstate Commerce Act and the Natural Gas Act and

that private rate contracts are therefore outlawed in both. The Solicitor General, on the other hand, although conceding that rate contracts are not outlawed by the Gas Act, nevertheless contends that the *Armour* case is controlling and that rate contracts can therefore be abrogated by the unilateral action of the natural gas company itself, without any finding of unreasonableness by the Commission. We think it is indisputable that rate contracts are valid under the Gas Act.

A. It is clear from a comparison of the two statutes that the Natural Gas Act does not outlaw rate contracts, whereas the Interstate Commerce Act does.

The basic difference between these two types of statutes is well illustrated by the opinion of this Court in the *Armour* case itself (209 U. S. 56 (1908)). That case was an appeal from a conviction for violation of the Elkins Act (Act of February 19, 1903, c. 708; 32 Stat. 847, U.S.C.A. Title 49, §§41-3) by entering into a private unfiled rate contract for the transportation of goods in interstate commerce at rates lower than the publicly filed rates. Armour defended on the ground that it was carrying out the provisions of a legal contract. In support of its determination that the contract was illegal under the Interstate Commerce Act, this Court pointed out that the principal purpose of the Act was "* * * to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper" (209 U. S. 56 at 80). Mr. Justice Day continued:

> "* * * There is no provision [in the Interstate Commerce Act] for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. * * *

> Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish." (209 U. S. 56 at 81)

Thus it is clear that private rate contracts are outlawed in the railroad industry. In discussing Armour's suggestion that as a matter of policy rate contracts should not be outlawed the Court said:

> "* * * It may be that such contracts should be recognized, giving stability to rates for limited periods; *that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done.* But, as we have said, such considerations address themselves to Congress, not to the courts." (209 U. S. 56 at 82) (Italics added.)

We suggest that these considerations did address themselves to Congress when it was enacting the Natural Gas Act, as well as the Federal Power Act[3] (Act of June 21, 1938, c. 556, 52 Stat. 821 *et seq.*, U.S.C.A. Title 15, §717, *et seq.*) Whereas in the corresponding provisions for the filing of rates to be charged to passengers and shippers in the Interstate Commerce Act the word "contract" is never once mentioned (See C. Br. pp. 107-113),[4] the Gas and Power Acts both expressly require that all "contracts" affecting rates be filed with the Commission (Gas

3. Everything said here about the Natural Gas Act, with a few minor exceptions which will be noted, is equally applicable to the Federal Power Act, which is substantially identical in terms so far as the present issues are concerned. *Federal Power Commission* v. *Sierra Pacific Power Company*, No. 51, this Term, and its companion case, *Pacific Gas and Electric Company* v. *Sierra Pacific Power Company*, No. 53, this Term, hereinafter referred to as "the Sierra case" or "Sierra", arose under the Power Act.

4. It is significant that in the case of contracts between common carriers for joint through rates, which are not outlawed by the Commerce Act, the Act expressly provides in Section 6(5) that such contracts must be filed. It is also apparent from this Court's opinion in *Kansas City So. Ry.* v. *Albers*, 223 U. S. 573 (1912), that such contracts are valid and binding as between the parties provided they are duly filed as required by Section 6(5).

Act, Section 4(c), Power Act, Section 205(c)), that no "contracts" affecting rates may be changed without due notice by filing (Gas Act, 4(d), Power Act 205(d)), and that the Commission may, upon a hearing and finding that any "contract" affecting rates is injurious to the public interest, set the same aside and order reasonable rates and "contracts" to be thereafter observed (Gas Act, 5(a), Power Act, 206(a)). The text of these provisions is set forth in full at pages 101-107 of the Commission's brief.

In other words, Congress in enacting the Gas and Power Acts not only gave heed to the suggestion made by this Court in the *Armour* case, 209 U. S. 56 at 82 (1907), but provided for the very same filing procedure which it had in the Interstate Commerce Act in respect to contracts between common carriers for joint through rates, which are expressly permitted under that Act. Thus it is quite apparent from the language of the Gas and Power Acts themselves that in enacting them Congress did not directly exercise its power to abrogate private rate contracts, as it had done in the case of contracts between carriers and shippers in enacting the Interstate Commerce Act, but, on the contrary, expressly recognized the continuance of such contracts in the natural gas and electric industries, and delegated its power to abrogate or modify them to the Federal Power Commission upon a finding, after hearing, that the public interest so required.

B. The difference between the Natural Gas Act and the Interstate Commerce Act is due to the difference in the nature of the industries being regulated: Whereas contracts are not necessary in the railroad industry, they are essential in the gas industry, as Congress recognized and as both petitioners concede.

We could not set forth the reasons underlying the differen between the Interstate Comerce Act and the Gas

Act more cogently and succinctly than does the Solicitor General at pages 53-55 of the brief submitted by him on behalf of the Commission. Accordingly, we beg leave to quote that exposition in full and adopt it as our own: After pointing out the difference in language between the two Acts to which we have just referred, the Solicitor General states, at pages 52-3:

> "The difference in language and Congressional policy regarding rate contracts [between the Gas and Commerce Acts] is explicable by the dissimilarity in nature of the industries being regulated. Railroads transport innumerable kinds and quantities of goods for many persons between various points on their lines and facilities must be available for all patrons. The Commerce Act's purpose to require uniform treatment of shippers could best be accomplished by requiring compliance with schedules of general applicability; permitting private contract rates would make even more complex the already elaborate railroad rate structure and, by the sheer weight of numbers, make the administrative burden unmanageable, with the result that the private contract would provide an easy way to circumvent the Commerce Act's prohibition against discrimination. Cf. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399.
>
> "The very large number of retail transactions involved in railroad rate regulation present an entirely different administrative problem from the relatively few wholesale interstate transactions regulated by the Gas and Power Acts. *The latter typically require substantial investment in capacity and facilities for the service of the particular customers. Consequently, gas and power companies' relations with their customers are ordinarily first arranged by contract* and, because of the limited numbers of purchasers, control over the rates embodied in these contracts apparently was not expected to create a substantial administrative burden

or to frustrate the prohibitions against preferential rates." (Italics added)

United also, although disagreeing with the Solicitor General's concession that the two Acts are dissimilar, has expressly conceded that binding contracts providing for "firm" rates are necessary if the natural gas industry is to flourish and grow. The Court will recall that both Petitioners referred in footnotes in their briefs[5] to the fact that since the decision below Mobile and United have entered into an agreement whereby Mobile assigned a number of its contracts for resale for industrial use, including the Ideal Cement Company contract here in issue, to United. Under the arrangement resulting from this assignment United now sells its gas directly to these industrial customers and Mobile receives a fee of 2¢ per MCF for transporting and distributing the gas for United's account. This agreement was approved on April 15, 1955 by the Federal Power Commission after a hearing. The stated purpose of this transaction was to convert the sales covered by those contracts into direct sales by United to Ideal and the other industrial consumers whose contracts were assigned, because such direct sales are not subject to regulation by the Commission (Gas Act, Section 1(b)). At the hearing before the Commission on the assignment of these contracts, Mr. Crymes Pittman, who is in charge of sales of gas by United in the Jackson District, which included Southern Alabama, was called as a witness by United. He first testified that several of Mobile's resale industrial customers whose contracts had expired had, after United's successful repudiation of its contract to supply Mobile for resale to Ideal, refused to enter into new contracts because of Mobile's apparent inability to quote firm rates (pp. 14-15). Mr. Crymes Pittman then testified as follows (pp. 20-21):

5. C. Br. Note 5, pp. 7, 8; U. Br. Note 10, pp. 12, 13.

"Q. What is the objective United wishes to accomplish with regard to industrial rates in the Jackson Zone? A: United has found over a long period of time that it can better serve the public at large by selling large volumes of industrial gas. By selling large volumes of industrial gas, United is able to sell gas to its general service customers at less cost. * * *

This proceeding seeks a solution to the fundamental problem presently encountered in the sale of gas to industrial customers. Such customers are normally willing to install the necessary facilities to burn gas and thereafter to purchase gas only when two conditions are met: first, that the cost of gas be no higher than competitive fuels; and second, that the cost of that gas be fixed by contract for reasonable periods of time.

Because the rates to distributors are subject to regulation and change, the distributors are unable to safely quote long-term rates for industrial gas. This condition, a major obstacle to industrial sales, could be effectively eliminated by permitting the pipe line company, that is, United to contract directly with the industrial customer."[6]

Having thus demonstrated the vital importance of binding rate contracts in the gas industry, one would have expected United to rest content with the decision below, as that decision expressly holds that distributors *are* able to quote "long-term rates for industrial gas" and offer contracts which will be valid and binding in accordance with their terms, as long as they remain "reasonable". Yet United insists that no such binding contract may be entered into, however beneficial to the gas industry it might be.[7]

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6. Official Stenographer's Report, pp. 20, 21, *In the Matter of United Gas Pipe Line Company*, Docket No. G-6060 (F.P.C., March 4, 1955).

7. United's purpose in seeking a reversal of the decision below and then entering into the assignment contract is particularly difficult to understand in view of the fact that under the assignment contract United receives less for

It is also apparent from the somewhat scanty record of legislative history that has been found by the parties hereto that the necessity of contracts in industrial sales in the gas industry was fully recognized by Congress at the time the Act was adopted. Thus, in explaining the purpose of the amendment to Section 4(e) of the Act which added the prohibition against the suspension of proposed new rates for sales of gas for resale for industrial use only, Congressman Lea, Chairman of the Interstate and Foreign Commerce Committee of the House and sponsor of the Act said:

> "* * * The effect of [this proposed amendment] is to prevent suspension in cases of industrial use *where there are short-term contracts* for the supply of gas for industrial use only."[8] (Italics added.)

Thus, it is indisputable that when Congress adopted the Natural Gas Act it recognized the fact that rate contracts were customary in the gas industry, and would continue to exist after the passage of the Act. Moreover, this is expressly conceded by the Solicitor General (C. Br. 41).

C. The Solicitor General concedes that under the Natural Gas Act private rate contracts remain "as valid, lawful and enforceable as they have always been".

United persists in ignoring the consequences of the difference in language between the Interstate Commerce and Gas Acts and insists that they are identical. By so doing, United has greatly simplified the presentation of its principal contention: That, as the Commerce Act con-

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the gas sold to Ideal than it did under the contract here at issue; for it will be recalled that under that contract United received 10.7¢ per MCF for gas sold to Mobile for resale to Ideal, to whom it was resold at 12¢ per MCF. Under the new agreement United receives 12¢ per MCF directly from Ideal but pays Mobile 2¢ per MCF for transportation. Thus United has agreed to receive .7¢ less per MCF under this new arrangement than it did under the contract which it seeks to abrogate in the instant proceeding for rendering the identical service.

8. Vol. 81, Part 6, 75th Congress, 1st Session, page 6727, Congressional Record July 1, 1937.

cededly outlaws rate contracts, the Gas Act, being identical, does too.

The Solicitor General takes a more realistic view. He concedes that, because rate contracts are necessary in the natural gas and power industries, "Congress recognized contracts in the natural gas and utility fields" (C. Br. pp. 52-53). And at page 32 he, quite correctly, asserts:

> "* * * private rate contracts, far from being 'automatically abrogated' by the Gas Act, are specifically envisaged as continuing to be made and to be enforced (see *infra*, pp. 51-55); they are as valid, lawful and enforceable as they have always been" (C. Br. p. 32).

Having thus conceded the basic principle on which the decision below rests, one would suppose that the Solicitor General might appropriately have confessed error; for surely if a private rate contract is valid and enforceable, it may not be set aside by the unilateral action of one of the parties to that contract. Surely it can only be abrogated by the Commission itself upon a finding of unreasonableness. However, the Solicitor General seeks to avoid this inescapable conclusion from his concession by the following somewhat startling assertion:

> "In short, while Congress recognized contracts in the natural gas and electric utility fields, it had no purpose to endow them with a special status or greater dignity than other forms of rates; on the contrary, its aim was merely to eliminate, for the new legislation, the Commerce Act's prohibition on contracts and to give them the same status and the same dignity as the other forms of rates—to lift contracts to par, not place them on a higher plane." (C. Br. p. 53)

It would seem that a mere reading of this assertion would carry its own refutation. We submit that a docu-

ment which can be abrogated at will by one of its signatories has not even enough "dignity" to be denominated a "contract." As we shall see in a moment, the arguments advanced in support of this novel doctrine are clearly untenable.

D. Section 4(d) does not authorize a natural gas company to file a proposed rate increase in violation of its duly filed contract.

Both Petitioners base their contentions upon what they describe as the "filed rate procedure" embodied in Section 4 of the Act. Specifically, they insist that Section 4(d) affirmatively authorizes a natural gas company itself to file rate changes unilaterally regardless of whether or not the rate is embodied in a contract. We find no such authorization, either in Section 4(d), or anywhere else in the Act.

Section 4(d) merely requires that "no change shall be made by any natural gas company in any such [*i.e.* duly filed] rate * * * or contract relating thereto except after thirty days' notice to the Commission and to the public," such notice to be given by filing with the Commission a schedule of the changes (C. Br. 101). How can these words of prohibition be tortured into an affirmative grant of power to a natural gas company to abrogate an existing duly filed and enforceable rate contract by its unilateral act? Far more explicit and affirmative language is required to produce such an incongruous result. *Federal Power Commission* v. *Niagara-Mohawk Power Corp.*, 315 U. S. 575 (1954).

We submit that the members of Congress who enacted this statute must be deemed to have had sufficient learning in the law of contracts to recognize that no change may be made in any valid and existing contract without the consent of both parties. As this Court pointed out in the

Wichita case (260 U. S. 48 at 56-7 (1922)), discussed more fully hereinafter (pp. 34-39), the only purpose and effect of such a provision for the filing of proposed changes in contracts is to add the further requirement that any such change is subject to public scrutiny and review by the Commission. Thus rate contracts are placed on a "par" with other rate schedules only to the limited extent of providing that no changes in rates, whether fixed by contract or by filed tariff, can be made without due notice to the Commission and to the public—thus complying with this Court's suggestions in the *Armour* case (209 U. S. 56 at 82 (1907)). Section 4(d) has no bearing on the rights of the parties to the contract *inter sese*.

Moreover, to suggest that Congress by this language intended to grant the power to file unilateral changes in rate contracts to a natural gas company is to impute to Congress an intent either to outlaw contracts altogether, which the Solicitor General concedes it did not do, or to delegate its legislative power to abrogate contracts to one of the parties to the contract, which clearly it had no power to do. For concededly, the only issue before the Commission in a hearing under Section 4(e) is the reasonableness of the proposed new rate.[9] The reasonableness of an existing rate can only be reviewed under Section 5(a). Thus under petitioners' construction, a natural gas company which, in order to attract new business or meet competition, has entered into and filed a contract to sell gas at a special low rate could abrogate that contract at will by merely filing a new schedule of higher, but still "reasonable" rates. For the Commission could not reject such a rate under Section 4(e), as it would not be "unreasonable".

"Contracts" which can be voided at will by one of the signatories are clearly not "as valid, lawful and enforce-

9 C Br 22 U Br 52

able as they have always been", as the Solicitor General concedes that rate contracts are under the Gas Act (C. Br. p. 32). On the contrary, such a contract would be void *ab initio* for want of mutuality. But this Court has held that the existence of the regulatory power of Government does not render contracts void for want of mutuality: In *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232 (1925), the city of Palatka sought to restrain a utility company from charging a higher rate than that contained in an existing franchise. The State courts granted the injunction and on appeal to this Court the utility company urged that the contract was void for lack of mutuality because the city had conceded that the legislature could regulate the rates. In disposing of this argument and sustaining the State courts, Mr. Justice Holmes writing for a unanimous court said:

> "* * * The argument cannot prevail * * * it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. *Georgia Railway & Power Co.* v. *Decatur*, 262 U. S. 432, 438. *Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215, 218. Such a notion logically carried out would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain." (268 U. S. 232 at 233)

According to the Solicitor General's conception of the "filed" rate procedure," the "higher power" which can overrule an existing and concededly binding contract is the natural gas company itself, acting under Section 4(d). In other words, his argument rests on the clearly untenable proposition that Congress delegated its power to determine when the public interest required a private contract to be set aside to one of the parties to the contract.

E. The existence of private rate contracts which are binding unless found unreasonable by the Commission in no way interferes with the proper functioning of the "filed rate procedure" embodied in the Act.

Petitioners' contentions that the existence of binding contracts would in some manner interfere with the proper functioning of the regulatory system embodied in the Act by limiting either the power of the Commission to regulate rates or the "duty" of companies to propose increases from time to time, are based upon a misconception of the true nature of that system.

Concededly, it is not the Commission, but the natural gas company which is charged in the first instance with the duty of proposing and filing all rates under Section 4(c) and all changes in rates under Section 4(d). The primary function of the Commission is not to fix rates, but to review all existing rates (under Section 5(a)) and all proposed changes in rates (under 4(e)), and determine whether such rates are "just and reasonable." It is only when the Commission has found after a hearing that such rates are unreasonable that the Commission itself has any authority to fix rates. Its power to do so is not hampered in the slightest degree by the existence of contracts. On the contrary, the Act itself prescribes precisely how and when that power may be exercised to abrogate unreasonable contracts.

Nor is a natural gas company under a "continuing mandatory duty" to propose changes from time to time. United's elaborate arguments in support of that contention (U. Br. pp. 29, 46) overlook the fact that a "reasonable rate" is not a mathematical point, but a zone:

> "A 'reasonable rate' is not a particular decimal. A 'reasonable rate' is one that falls within the zone of reason; it is a field, and not a mathematical point. * * * A finding that a particular rate is

> reasonable is not, therefore, a finding that every other rate is either unreasonable or confiscatory." *Wichita Gas Co.* v. *Public Service Commission*, 2 F. Supp. 792 at 799 (D. C. Kan., 1933), modified, 290 U. S. 561, (1934).

See also, *Washington Gas Light Co.* v. *Baker*, 88 App. D. C. 115, 188 F. 2d 11 (1950), cert. denied, 340 U. S. 952, (1951).

The "zone of reason" is bounded at the top by a rate which will produce a fair return on its investment to the company—although even such a rate "is not capable of exact mathematical demonstration." *United Railways & Electric Co.* v. *West*, 280 U. S. 234, 251 (1930). But any rate proposed by a company which will produce more than a "fair return" must be set aside by the Commission as exorbitant. Conversely, any rate imposed by the Commission to replace a rate found to be exorbitant which will produce less than a fair return will be set aside by the courts at the instance of the company as confiscatory.

But this does not mean, as petitioners seem to contend, that rates which will produce a full "fair return" are the only "reasonable rates" permissible under the Act, and that therefore a natural gas company must be at all times free to propose, or is obligated to propose, changes in its rates so as to keep them at that level. A company is under no obligation to propose or maintain only rates which will produce the maximum return to which it is legally entitled. The company's management is the guardian of the company's stockholders, not of the public interest. It is the Commission's primary concern to protect the public interest and see that consumers at all times are charged only the "lowest reasonable rates" available (Section 5(a)). Thus if the company, for its own business purposes, such as to meet com-

petition or attract new business, proposes a non-discriminatory and non-preferential rate which produces less than a fair return, the Commission must accept such a rate. For it is not "unreasonable" unless it is unduly preferential or discriminatory. If it meets those tests, it is "the lowest reasonable rate", and it must be approved by the Commission.

This proposition is well illustrated by the action of the Commission in the *Sierra* case (No. 51 and No. 53, this Term). There the company had filed a schedule of new rates which, while higher than the contract rate, would still produce a return of only 4.75%, although it was stipulated on the record and accepted by the Commission that 5½% was a reasonable rate of return (Record in Nos. 51 and 53, p. 464). In approving the proposed new rate the Commission in its order said:

> "It is apparent that P.G.&E. [the selling company] regards the deficiency of the .75 of a percentage point as warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra." (Record in Nos. 51 and 53, p. 465.)

After pointing out that P.G.&E. would lose a substantial investment if it lost Sierra's business, and that it affirmatively appeared that this deficiency from a reasonable rate of return was not offset by any excess return on sales to other purchasers, the Commission concluded:

> "This, and the fact that no undue discrimination nor preference results from the deficiency, as we have already seen, makes clear that the proposed rate is not unreasonable and is lawful." (Record in Nos. 51 and 53, pp. 465-6.)

Thus, the lower limit of the "zone of reason" is any rate at which the company offers to sell its gas, and which

is neither preferential nor discriminatory. Any rate or contract providing for a rate which falls within that "zone of reason", must be approved by the Commission. For it may only reject a duly filed rate after a finding that it is unreasonable.[10]

It follows also that a rate embodied in a contract which has been duly filed and permitted to become effective by the Commission remains the legal rate for the duration of the contract provided it does not become so unreasonable as to injure the public interest. For the company is bound by its contract not to increase it and the Commission may not do so unless it is found to have become unreasonable.

Both petitioners complain that if a natural gas company cannot resort to the filing procedure under 4(d) to increase a contract rate, it cannot itself abrogate its contract at all because if is not one of the organizations authorized to initiate a proceeding under Section 5(a) in order to have it reviewed by the Commission. But why should it? The contract must have been considered reasonable by the Commission when entered into and filed, else it would not have been permitted to become the effective legal rate. Congress no doubt assumed that if it later becomes unreasonable, the injured parties themselves would initiate a 5(a) proceeding: If it becomes exorbitant, the ultimate consumers or their representative, a State Commission, can be relied on to do so. If it becomes preferential or discriminatory, the consumer who is injured may initiate such a proceeding. And if it become so bur-

10 No doubt this is the explanation for the provision in Section 5(a) that when an existing rate has been found unreasonable after a hearing under 5(a) the Commission may itself fix a *lower* rate, but may not fix an *increased* rate except in accordance with a filed rate proposed by the company. It is only the company itself which can propose a rate producing less than a fair rate of return. Such a rate, if fixed by the Commission, could be set aside as confiscatory. Thus this provision leaves the door open for the company to file a rate producing less than a full return if it is willing to do so, thereby preserving the consumers' right to the "*lowest* reasonable rates," as required by the last words of Section 5(a).

densome as to endanger the utility's ability to perform its public duties, the Commission can readily be advised of this fact, and can initiate a proceeding on its own motion."[11]

When it is borne in mind that it is only if the public interest so requires that a private contract can be abrogated at all these provisions fit logically into place, in accordance with well settled principles of rate regulation. It is well established that the public interest does not require a company's stockholders to be bailed out of a contract entered into by the company's management simply because it proves to be less profitable than anticipated. For example, in *Arkansas Natural Gas Co.* v. *Arkansas Railroad Comm. et al.*, 261 U. S. 379 (1923), this Court was confronted with a contention that it was the duty of a public utility commission to abrogate a contract if it was shown that the rate provided thereunder was inadequate, even though there was no showing that the public interest was involved or that the effect of the low rate would be either to place an undue burden upon other customers or to impair the ability of the company to fulfill its public functions. While the case was decided on the basis of a provision of an Arkansas statute which forbade the State Commission to abrogate existing contracts, Mr. Justice Sutherland, writing for a unanimous court, said:

> "The question whether, in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gate rates in contravention of the contracts, may be put aside with brief consideration. While a State may exercise its legislative power to regulate public

11. Practical examples of how State Commissions which recognize the validity of contracts under similar statutes have met this problem will be presented in the brief to be submitted in the *Sierra* cases.

> utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (*Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372, 375; *Producers Transportation Co.* v. *Railroad Comm.*, 251 U. S. 228, 232) there is, quite clearly, no principle which imposes an obligation to do so merely to relieve a contracting party from the burden of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist *per se*. It is the intervention of the public interest which justifies and at the same time conditions its exercise." (261 U. S. 379 at 382-3)

It follows that there is no need to give a natural gas company the power to initiate a proceeding designed to abrogate its own contract simply because it is costly to its stockholders. If the public interest is adversely affected by the contract the members of the public have ample power to complain to the Commission and the Commission, as the guardian of the public interest, has ample power, as well as a clearly defined duty, to protect that interest.

Nor is there any substance to the contention that it would impose an "intolerable burden" on the Commission to require it to pass on the reasonableness of a contract before it can be set aside. As suggested in the *Armour* case, *supra*, the existence of contracts gives stability to the industry, and decreases, rather than increases, the number of rate changes which must be "processed" by the Commission.

II

An attempt by a natural gas company to change a contract rate by filing a schedule of new rates under Section 4(d) over the objection of the purchaser, being unauthorized by the Act, must be rejected by the Commission.

If, as we think is abundantly clear from the foregoing discussion, an attempt by a natural gas company to increase a rate embodied in a contract unilaterally by a mere filing under Section 4(d) is unauthorized under the Act, it follows that it must be rejected by the Commission as an unlawful filing when objected to by the purchaser. If the Commission accepts the filing, the new rate will automatically become effective either in thirty days or, if suspended, in five months, and can only be rejected after a hearing under Section 4(e). As we have seen, under that section the Commission must approve the new rate, however much it violates the existing contract and however reasonable the contract rate itself might be, provided the proposed new rate is within the "zone of reason."

Petitioners insist that the Commission has no authority to reject a proposed change of rates filed by a natural gas company under 4(d) without a hearing under 4(e). They base this contention primarily on the decision of the Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (3rd. Cir. 1953). We submit that that case is clearly distinguishable. There a gas company filed a schedule of proposed rate increases under Section 4(d) and the Commission, without a hearing of any kind, rejected the filing on the stated ground that it appeared from the supporting data filed with the schedule

that part of the proposed increase was predicated on an anticipated increase in the cost of gas which had not as yet materialized. In other words, the Commission undertook to reject the filing without a hearing, on the ground that the proposed increase was shown by the supporting data to be unjustified and therefore unreasonable. We have no quarrel with the decision of the Court of Appeals that without a hearing under 4(e) the Commission may not reject a proposed increase filed under 4(d) because of any alleged unreasonableness of the *new* rate.[12]

The Court of Appeals recognized in that case that a proposed rate change could be rejected by the Commission if it were not duly filed in accordance with the necessary "formal requirements" (202 F. 2d 899 at 903). But petitioners contend that the illegality of a unilateral filing in violation of a contract under 4(d) would be a "substantive" rather than a "formal" defect, so that, under their construction of this dictum in the *Mississippi River Fuel* case, it could not be rejected on that ground (C. Br. 33-35). We respectfully submit that the doctrine of the *Mississippi River Fuel* case that the Commission is without power to reject a filing under 4(d) without a hearing under 4(e) must be limited to defects in the filing which can be corrected after such a hearing, *i.e.*, the reasonableness of the proposed *new* date. Otherwise, the Act provides no remedy whatever for a filing that is illegal or unauthorized for any reason, "formal" or "substantive", other than the reasonableness of the new rate.

As the Commission may not consider the reasonableness of the existing contract in the hearing under 4(e), it

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12 The Solicitor General's brief, in a footnote on page 37, asserts that the Commission's records show that Mississippi's rates had originally been fixed by contract and that Mississippi proposed to change them by filing a schedule without the purchaser's consent, citing C.A. 3, No. 19868, Jt. App. 4a, 7a. We find nothing in the cited portion of the record, or elsewhere, to support this assertion. But in any event, it is apparent from an examination of the opinion of the Court in that case that the existence of a contract was not considered by the Court in reaching its decision (202 F. 2d 899 (1953)).

follows that this is not a defect which can be corrected upon such a hearing. Accordingly, we submit that it must follow that as soon as the Commission is on notice that the filing is in violation of an existing contract, the filing must be rejected, just as the Commission must have the undoubted power to reject such a filing if it is unlawful for any other reason except the reasonableness of the proposed new rate.

It should be noted also that if the Commission is powerless to reject a filed increase of a rate embodied in a contract for the sale of natural gas for resale for industrial use only, the proposed increase will automatically become effective thirty days after filing, for the Commission has no authority to suspend the effective date of a filed change in rates for resale for industrial use only. Inasmuch as petitioners also argue vehemently that no refund is permissible when there has been no suspension, it follows that, at least until a hearing as to the reasonableness of the new rate has been held and completed—a process which frequently takes several years—the contract would be abrogated even though the proposed new rate itself were ultimately found to be unreasonable.

It is to be borne in mind that the contract proposed to be changed is on file with the Commission, so that the Commission is technically on notice of its existence. Of course, if the purchaser under the contract, having notice of the proposed change, remains silent, the Commission would no doubt be justified in accepting the filing on the assumption that it had consented to the change. But when, as here, a formal objection is filed, the Commission is fully on notice that the proposed filing is unlawful and unauthorized by the Act, and should be rejected.

If it should be argued that it would place a great burden on the Commission to require it to determine whether or not the rate to be changed is embodied in a contract, the

simple answer is that the Commission has ample authority to amend its rules so as to provide that any company filing a proposed change must state whether or not the existing rate is embodied in a contract, and if so, must state whether or not the other party to the contract has agreed to the change.

Thus it is clear that a schedule of rate changes filed under Section 4(d) can and must be rejected by the Commission when it appears that the existing rates are embodied in a duly filed contract and that the proposed change has not been agreed to by both parties to the contract.

III

The overwhelming weight of authority in both Federal and State Courts supports the foregoing construction of the Natural Gas Act.

While we do not believe that the proper construction of the filing provisions of the Natural Gas and Federal Power Acts, now presented to this Court for the first time, can turn upon the citation of innumerable cases from lower courts, nevertheless; petitioners place such emphasis on their contention that the "overwhelming" weight of authority supports their construction citing over 175 Federal and State cases in their two briefs in its support that we must beg the court's indulgence in order to set forth adequately the fallacy of such a claim.

A. This Court has held that under a statute substantially similar to the Natural Gas Act a contract could not be abrogated by a company by the mere filing of a new schedule, in the absence of a finding by the Commission that the contract was against the public interest.

The proposition that under a regulatory statute which recognizes contracts and contains filing and review pro-

visions comparable to those contained in the Natural Gas Act, a filed rate embodied in the contract may be changed by the mere filing of a proposed schedule of increased rates, was squarely presented and rejected by this Court in *Wichita R.R. v. Pub. Util. Comm.*, 260 U. S. 48 (1922). The statute involved in that case, the Kansas Public Utility Law (Session Laws of 1911, c. 238, p. 422 *et seq.*) is in its general structure substantially similar to the Natural Gas Act. Section 11 of the Kansas Law, like Section 4(c) of the Gas Act, requires the filing of all existing rates. Section 20, like Section 4(d), provides that no change in existing rates may be initiated by the company without filing and publishing a schedule showing the proposed changes. The only distinction between that provision and the Gas Act is that under the Kansas statute no proposed change may become effective without the affirmative consent of the Commission, whereas under Section 4 of the Gas Act the rate becomes effective in 30 days unless suspended, and becomes permanently effective after five months of suspension unless affirmatively found unreasonable by the Commission after a hearing under 4(e). Petitioners make much of the fact that Section 20 of the Kansas statute does not provide for a hearing, but as the hearing provided for under Section 4(e) relates solely to the reasonableness of the proposed new rate and not to the reasonableness of the contract rate, this is a "distinction without a difference." Neither statute provides for a hearing or finding as to the reasonableness of an existing contract in a proceeding initiated by the filing of a schedule of new rates, and under both, such a proposed filing becomes effective unless the Commission either fails to approve the new rate, under the Kansas statute, or affirmatively disapproves, under the Gas Act.

Section 13 of the Kansas Law, like Section 5(a) of the Gas Act, provides that:

> "It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, * * * and if after full hearing and investigation the commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates * * * as shall be just and reasonable."

Section 16, like the second half of 5(a), provides that if upon such hearing the rates are found to be unjust, unreasonable, etc., the Commission shall have power to substitute therefor such rates "as it shall find, determine or decree to be just, reasonable and necessary." Thus the regulatory scheme set forth in the Kansas statute is in all essential respects identical with that set forth in the Natural Gas Act.

The *Wichita* case dealt with a contract for the sale of electric power at fixed rates for a term of thirty years. The contract was entered into in 1910 between the Wichita Railroad & Light Company, which operated a street railroad and furnished electric light in the City of Wichita, Kansas, and the Kansas Gas & Electric Company. The following year, 1911, the Kansas Public Utility Law was adopted, and the contract was duly filed with the Kansas Public Utilities Commission in 1914 as required by that statute.

In January, 1918, the Kansas Gas & Electric Company filed a petition with the Public Utilities Commission of Kansas alleging that its existing rates had been confiscatory since 1914 and requesting that an order be issued authorizing it to add certain surcharges. The Wichita Company, the purchaser, appeared in the proceeding, pleading its contract as a bar to the proposed increase.

On April 1, 1918, the Commission, without having held a hearing, issued an order allowing surcharges at lower rates than those requested by the utility, but higher than those provided under the contract.

The Wichita Company, alleging that the order impaired its contract, immediately sought and obtained an injunction from the U. S. District Court restraining the Commission from putting it into effect. The Court of Appeals for the Eighth Circuit reversed[13] (268 Fed. 37 (8th Cir 1920)), but this Court, in a unanimous opinion written by Mr. Chief Justice Taft, reinstated the judgment of the District Court, holding that under the Kansas statute the Commission could not abrogate or modify an existing contract without an express finding that the public interest required such action. 260 U. S. 48 (1922).

In the course of his opinion, the Chief Justice quoted with approval from the decision of the Kansas Supreme Court in *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1, 147 Pac. 1130 (1915), as follows:

> "* * * The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates" (260 U. S. 48, 58 (1922)).

Thus it is clear that under the law of Kansas, which of course was binding on this Court, the statute did not automatically outlaw rate contracts. Nevertheless, the State

13 Primarily on the alleged authority of *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372 (1919), discussed hereinafter at pages 42 to 44.

Commission and the company in that case argued, as the petitioners argue in the present case, that because the company was authorized to file changes in rates under Section 20, which required no finding as to the reasonableness of the existing rates, the contract rate had been effectively increased by the mere filing. To this argument Mr. Chief Justice Taft replied:

> "* * * This construction of §20 [§§4(d) and (e) of the Gas Act] is doubtless correct, but it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates. It could not do so any more than would the original filing of a schedule of rates under §11 [§4(c) of the Gas Act] requiring every public utility to publish and file with the Commission all schedules of rates do this. The consent of the Commission in §20 is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules. Such consent does not involve a hearing or a finding and a decision. The section does not, therefore, cover, or measure the essentials of, the proceeding in this case before the Commission which the order shows was upon pleadings and *inter partes*" (260 U. S. 48 at 56-7).

Petitioners make much of the Chief Justice's reference to the absence of a hearing or a finding and decision under Section 20 of the Kansas statute, pointing out that the Gas Act does require a hearing and finding before a proposed rate change filed under Section 4(d) can be set aside by the Commission under 4(e). The short answer to this contention is that, as petitioners themselves repeatedly point out, the hearing provided for under Section 4(e) relates only to the reasonableness of the new rate and does not involve any hearing, finding, or decision as to the reasonableness of the existing rate. It is obviously

the absence of such a finding that the Chief Justice referred to as fatal to the contention that the mere filing could "accomplish the result of abrogating contract rates" (260 U. S. 48 at 56). A hearing and finding as to the reasonableness of the *new* rate would be immaterial and irrelevant.

Petitioners also seek comfort from the fact that the *Wichita* case appears to have been cited most often in support of the proposition that "When * * * an administrative agency is required as a condition precedent to an order, to make findings of fact, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective" (260 U. S. 48 at 59). This may be so; but it must be borne in mind that it is only because the Kansas Commission had failed to make the finding of unreasonableness required by Section 13 of the Act, just as in the instant case the Federal Power Commission has failed to make the identical finding required by Section 5(a) of the Gas Act, that this issue was presented to this Court, and it was decided adversely to petitioners' contentions.

In any event, the *Wichita* case is the only decision by any Federal Court dealing with the problem here presented, under a statute which did not automatically abrogate existing contracts. As we have seen, the Supreme Court of Kansas had expressly held in the *Kaul* case, *supra*, that "The passage of the Act did not automatically overthow contracts" (95 Kan. 1 at 4, 147 Pac. 1130 at 1131); just as the Solicitor General has conceded in the present case that contracts were not "automatically abrogated" by the Gas Act (C. Br. pp. 11, 53). Nor has the *Wichita* case ever been overruled or limited in the application of its principles to such a statute. On the contrary, the principles laid down by this Court in that case have been expressly applied to the Gas and Power Acts by the Courts of Appeals of three Circuits before whom the construction

of these Acts has been litigated: the instant case in the Third Circuit, the *Sierra* case in the District of Columbia Circuit (223 F. 2d 605 (1955)) and the case of *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (1944), in the Tenth Circuit. We shall not take up the time of the Court to discuss the first two cases, as one is the subject of the present appeal and the other the subject of the appeal to be argued before this Court at the same time. As will appear from the records on those appeals, both Circuits construe the Gas and Power Acts exactly as we do here.

In the *Colorado Interstate* case the Court of Appeals for the Tenth Circuit had under review certain orders of the Federal Power Commission issued after an investigation of existing rates under Section 5(a) of the Natural Gas Act. This investigation had been instituted in part on the complaints of the City and County of Denver and of the Public Service Commission of the State of Wyoming, and in part by the Federal Power Commission itself. The orders under review, among other things, found that the rates and charges embodied in certain existing rate contracts were unreasonable and unjust, and fixed lower rates. The natural gas companies challenged this finding for want of substantial evidence to support it. Although the Court rejected this contention because it found that the record did contain substantial evidence to support the finding, it sustained the right of the companies to raise the issue in the following language:

> "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness. Wichita R. & Light Co. *v.* Public

> Utilities Commission, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F. 2d 881. And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431." (142 F. 2d 943 at 954)

Petitioners attempt to distinguish this case on the ground that it arose in a proceeding under 5(a). Apparently they would write into the Tenth Circuit's opinion, following the words "[s]uch rates and charges could be modified only after an express finding of unreasonableness" the words "except that they may be modified at any time by the company itself by the mere filing of a schedule of higher rates under Section 4(d)." But that is not what the Court said and we submit that it could not have properly said so.

As there is no substantial distinction between the *Wichita* case and the case at bar, we submit that, if authority is necessary to support the construction of the Natural Gas Act which we have hereinabove set forth, this case furnishes such authority and is controlling.

B. The petitioners do not cite a single case which detracts from the binding effect of the *Wichita* case.

Both petitioners cite many cases which arose either under the Interstate Commerce Act or under State statutes regulating railroads. As we think is clear from our discussion of the *Armour* case, *supra* (pp. 14-16), such cases have no bearing on the present issue. Concededly, private rate contracts between carriers and shippers or

passengers have been outlawed in the railroad industry by both Federal and State laws.

The cases in this Court most strongly relied on by petitioners, other than the *Armour* case and *Minneapolis, St. P. & S.S.M.R. Co.* v. *Menasha W. W. Co.*, 245 U. S. 633, which deals with the Wisconsin statute regulating railroads, and is identical with the Interstate Commerce Act, are *Union Dry Goods Co.* v. *Georgia Public Service Co.*, 248 U. S. 372 (1919) which United contends is decisive here, and *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109 (1937).

The *Union Dry Goods* case is easily disposed of by a mere glance at the order of the Railroad Commission of Georgia (now known as the Georgia Public Service Commission) and the opinion of the Trial Court denying Union's application for an injunction, both of which are printed in full at pages 9 to 46 of the Appendix to United's brief. As there appears, there had been a rate war between two competing power companies in the City of Macon, Georgia. During the course of this rate war contracts at lower and lower rates were entered into by each company for the purpose of holding existing customers or obtaining new customers. Both companies became so weakened by this competition that one finally bought out the other, and then filed a petition to the Commission, stating that its existing rates were non-compensatory and ruinously low and seeking authority to increase them. There was no attempt to put increases into effect unilaterally in advance of Commission action. After extensive hearings the Commission fixed a scale of maximum rates, designed to produce a fair return to the company, and then, reciting that it had given careful attention to the contentions of those who contended their contracts were binding, held that all contracts calling for lower rates "must be abrogated as unlawfully discriminatory,

and made to correspond with the Commission's scale, or the same special rates given to all of the public (App. to U. Br. p. 43)." In explaining its action the Commission stated that after careful consideration it had determined that:

> "To allow them [the contract rates] to stand and to require others of the public to pay higher rates would be rank discrimination; such a condition cannot be allowed to exist. * * * Unlawful discriminations arising out of different rates can only be removed by moving the lower rate up to the higher, or the higher to the lower.
>
> "The rates prescribed herein are in the opinion of the Commission, at this time, just and reasonable. We have no power to compel the company to accept less, except as implied in the power to prevent unlawful discrimination (App. to U. Br. pp. 43-44)."[14]

Thus the Georgia Commission followed precisely the procedure which we advocate here. It found, after a hearing, that existing contracts were discriminatory and therefore unlawful and ordered that those which did not conform with the rate charged to the general public by the company should be abrogated. If any such situation were found to exist here, we would, of course, agree that the contract in question should be set aside. But there is no contention here that United's contract to sell gas to Mobile at 10.7¢ per MCF for resale to Ideal was discriminatory.

Unlike other contract customers, the Union Dry Goods Company had taken no part in the proceedings before

14 This order furnishes a practical illustration of the application of the provision in Section 5(a) of the Gas Act prohibiting the Commission, after a finding that the existing rates are unreasonable, from ordering an increase except in accordance with an increase filed by the company. The Commission can prevent discrimination, but if doing so requires an increase the company must fix the increased rate that will accomplish that purpose. But, of course, the proposed increase is again subject to review by the Commission under Section 4(e).

the Commission but rested on the erroneous assumption that its contract was beyond the regulatory power of the Commission. Accordingly, it refused to pay the higher rates ordered by the Commission. Thereupon the Georgia Public Service Corporation refused to serve it further and the Union Dry Goods Company sought an injunction. Thus in the posture in which the litigation reached the courts, it was clear that the Union Dry Goods Company had not exhausted its remedies before the Commission. It was merely making a collateral attack upon the order of the Commission. Moreover, as the opinion of the Trial Court shows, the basis of its attack was simply that the Georgia statute permitting the Commission to abrogate contracts upon a finding of unreasonableness was unconstitutional because it impaired the obligations of its contract (App. to U. Br. p. 10). This was the sole issue presented and brought to this Court for review and we have no quarrel with the decision of this Court that there was no merit to that contention (248 U. S. 372 (1919)). Thus the *Union Dry Goods* case has no bearing whatever on the issue here presented. The right of the utility itself to increase its contract rates by a mere filing was not involved or even mentioned. The case merely reaffirms the well established proposition that rate contracts are subject to the paramount power of government regulation.

While the opinion of this Court in the *Midland Realty* case (300 U. S. 109 (1937)) may seem upon a casual reading to give support to the petitioners' contentions, upon a more careful reading it will be found that it is of no greater avail than cases arising under the Interstate Commerce Act. To be sure, in that case the Court below had construed the statute (Rev. Stat. Mo. 1929, c. 33, §5121, *et seq.*) as permitting contracts to be abrogated by a mere filing of a schedule of higher rates, and this was attacked as unconstitutional by the Midland Company. But as this Court pointed out:

> "These questions are to be decided upon the construction that the state supreme court put upon the statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates." 300 U. S. 109 at 113.

The Court cited a number of decisions of the Supreme Court of Missouri. An examination of the first two cases cited, *Fulton* v. *Public Service Comm.*, 275 Mo. 67, 204 S. W. 386 (1918); *Sedalia* v. *Public Service Comm.*, 275 Mo. 201, 204 S. W. 497 (1918), will show that the Supreme Court of Missouri had concluded that because of "our own peculiar constitutional provision" all existing rate contracts had been outlawed in Missouri (*State ex rel. City of Sedalia* v. *Public Service Comm.*, 275 Mo. 209 at 212, 204 S. W. at 499). The "peculiar constitutional provision" relied on was an amendment to the State Constitution adopted in 1875 providing that "the exercise of the police power of the State shall never be abridged." The Missouri courts concluded that the very existence of a private rate contract would constitute a violation of this provision because it might interfere with the proper exercise of the State's regulatory powers. That this, and not the Court's construction of the statute itself, was the basis of the Missouri courts' position is apparent from the *Fulton* case, *supra*, decided nine days after the *Sedalia* case. There the Missouri court on the authority of the *Sedalia* case, overruled one of its own prior decisions which had recognized the validity of an existing rate contract, but refused to overrule the case of *Sloane* v. *Railroad*, 61 Mo. 24 (1875), on the express ground that "the *Sloane* case was based upon legislation enacted prior to the adoption of the Constitution of 1875" (275 Mo. at 71, 204 S. W. at 386).

We do not agree that the existence of a rate contract can properly be considered as abridging the police power under a statute such as the Gas Act, which itself empowers the Commission to set aside such contracts under Section 5(a) at any time that they are found to interfere with the proper exercise of the State's police power. But we are not here concerned with the construction which the Supreme Court of Missouri has placed upon the Missouri Constitution. This Court in considering the issues before it in the *Midland* case (300 U. S. 109), was bound by the decisions of the highest court of that State that under its constitution, private rate contracts had been outlawed, just as the Interstate Commerce Act outlaws rate contracts in the railroad industry. Accordingly, the *Midland* case has no more bearing here than the *Armour* case (209 U. S. 56).[15]

The only other Federal authority cited by petitioners which seems to have any bearing on the issues here before the Court is a *dictum* of the Court of Appeals for the Fifth Circuit in the recent case of *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (5th Cir., 1954). The same proposed increases filed by United which form the basis of the present litigation also purported to increase the rates fixed by a contract between United and Tyler Gas Service Company, a distributing company serving the City of Tyler, Texas, under a franchise agreement with that city. The difference between that case and the present is fundamental: Tyler did not make its objections to United's repudiation of its contract before the Commission, but sought in a collateral proceeding in the United States District Court to obtain an injunction preventing United from increasing its rates in violation of its con-

15. It is also worthy of note that *Midland*, like *Union Dry Goods*, was a collateral attack on an order of the Commission entered in a proceeding in which Midland had not appeared.

tract. The Commission was not even made a party to that proceeding.

That the Fifth Circuit itself recognized that these circumstances clearly distinguished its decision from that of the Third Circuit in the instant case, is apparent from its own opinion:

> "Assuming, without deciding, that the opinion of the majority [in the *Mobile* case] is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief.'; * * *." (217 F. 2d 73, at 78)

With this we are inclined to agree, for it seems to us that the proper procedure for the appellants in the *Tyler* case was to petition the Commission, as *Mobile* did here, to reject the filing of the increased rate because it violated their contract rights. But petitioners rely on the *dictum* of the Fifth Circuit that:

> "* * * the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission." (217 F. 2d 73, at 77)

We agree that a private contract fixing rates so high that they would penalize the consumers affected or so low as to jeopardize the company's ability to serve the public

would be in violation of the requirement of Section 4(a) that all rates "shall be just and reasonable." In such a situation the Commission not only has the power, but the duty, after a hearing under 4(e) at the time the contract is filed, or under 5(a) at any time thereafter, to set the contract aside upon a finding that the contract rate will produce such results. But no such issue is presented on this appeal.

Thus even this *dictum* is not in conflict with the decision below. We know of no case which has either construed the Gas Act in a manner conflicting with the construction placed upon it by the Third, Tenth and District of Columbia Circuits, or casts any doubt upon the correctness of the construction placed upon the substantially identical Kansas Public Utility Law by this Court in the *Wichita* case (260 U. S. 48 (1922)).

C. The majority of cases arising in states whose regulatory statutes do not automatically abrogate private rate contracts sustain the proposition that a filed contract rate cannot be increased by the utility by the mere filing of a new rate schedule.

In support of his oft-repeated assertion that the overwhelming majority of State cases support the contentions advanced in his brief on behalf of the Federal Power Commission the Solicitor General asserts that some thirty States have regulatory statutes in the utility and transportation fields providing for a "filed rate procedure" similar to that provided for in the Natural Gas Act (C. Br. pp. 56, 57 fn. 35). We concede that this may be the fact, but are at a loss to perceive its significance in this case. The sole question at issue here is whether under such a regulatory statute the contract rate may be increased by one of the parties to the contract by a mere filing of a new rate schedule.

An examination of the reported cases arising under State regulatory statutes will disclose that the majority of cases arising under statutes which have been construed by the State courts as not automatically abrogating rate contracts hold that such a contract can only be set aside by the Commission upon a finding of unreasonableness, and that it cannot be abrogated by the mere filing of a new schedule.

The Majority View

Virginia. In *Commonwealth* v. *Shenandoah River Light & Power Corp.*, 135 Va. 47, 115 S. E. 695 (1923), the Supreme Court of Virginia, in holding that a contract rate cannot be abrogated by the mere filing of a new rate schedule, said:

> "To hold otherwise would enable one of the parties bound by a contract to evade its obligations without cause assigned or shown and thus to accord to such action the sanction which can only be accorded to action by the State after cause has been shown." (135 Va. at p. 73, 115 S. E. 702-703)

Rhode Island. The U. S. District Court for the District of Rhode Island, in *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (1924), rejected the contention that under the Rhode Island Statute a contract rate could be increased by a mere filing, saying:

> "It seems evident, however, that the defendant cannot itself exercise the police power of the state to relieve it in the public interest from a burdensome contract.
>
> "Nor can its own judgment be accepted by this court as a sufficient ground for disregarding the contract rights of the plaintiff." (295 Fed. at 904)

Vermont. In *Rutland Ry. Light & Power Co.* v. *Bardith*, 94 Vt. 421, 114 Atl. 582 (1920), the Supreme Court of Vermont said:

> "The only question in this case is whether a public service corporation * * * can of its own motion, and without the consent of its customer, or action on the part of the Public Service Commission, during the term of the contract, change the contract rate to a higher rate * * * by simply filing a schedule of the increased rate with the Public Service Commission." (94 Vt. at pp. 421-2, 114 Atl. at 582)

The Court concluded that the company could not, saying, at p. 423:

> "All such contracts are made subject to the proper exercise of this [the State's] power; but the parties to the contract are bound by its terms until they are lawfully modified. Neither party can of his own motion modify the contract, by increasing or diminishing the rates; for that would be the exercise of the police power by a party to whom such power was not delegated. * * *"

Maine. The Supreme Judicial Court of Maine, in *Re Searsport Water Co.*, 118 Me. 382 at 393, 108 Atl. 452 at 458 (1919), stated that:

> "A utility cannot repudiate such a contract at will. Nor does the filing of new schedules under section 28 have the effect of changing the rates fixed by the contract."

The opinion in each of the cases hereinabove cited also pointed out, of course, that the rate could be changed by the Commission itself upon a proper finding of unreasonableness.

Kansas. We have seen from the discussion of the *Wichita* case, at pages 35 to 39, that the same rule applies in Kansas.

Indiana. *Winfield v. Public Service Commission of Indiana*, 187 Ind. 53, 118 N. E. 531 (1918), seems to favor a similar result.

Alabama. In Alabama the rule appears to be that once a contract has been accepted by the Commission, it can not be changed, even by the Commission without the consent of both parties. *Birmingham Electric Co. v. Alabama Public Service Comm.*, 233 Ala. 675, 173 So. 19 (1937).

The Minority View

The Solicitor General cites cases from eight States which he contends sustain his position: Missouri, Arkansas, Wisconsin, New Jersey, Washington, New York, Colorado, Pennsylvania. Upon examination, it will be found that only the cases cited from Colorado and Pennsylvania sustain the proposition for which they are cited.

Missouri. As we have seen, at pages 44 to 46 above, the *Midland Realty* case is based upon the State court's holding that under the Missouri Constitution all private rate contracts are invalid.

Arkansas. An examination of the case of *Harrison Electric Co. v. Citizens' Ice & Storage Co.*, 149 Ark. 502, 232 S. W. 932 (1921) will show that the Supreme Court of Arkansas construed its utility statute as being identical with the Interstate Commerce Act and therefore governed by such cases as the *Armour* case, *supra*.

Wisconsin. *Minneapolis, St. P. & S.S.M.R. v. Menasha W.W. Co.*, 159 Wis. 130, 150 N.W. 411 (1914), aff'd 245 U. S. 633 (1917) dealt with the Wisconsin Act regulating railroads, which, like the Interstate Commerce Act, outlawed all private rate contracts. Moreover, as the Solicitor General concedes, Wisconsin draws a sharp distinction between the regulation of carriers and other

utilities, just as Congress did: "approval is required for increases in rates proposed by other utilities" (C. Br. 69).

New Jersey. The Solicitor General cites *New Jersey Suburban Water Co.* v. *Town of Harrison*, 120 N.J.L. 546, 1 A. 2d 61 (1938), in support of the proposition that the State of New Jersey permits the abrogation of contracts by a mere filing. However, as he concedes, that case was reversed, although on other grounds (122 N.J.L. 189, 3 A. 2d 623 (1939)), so that the point in issue here has never been passed on by the highest Court in New Jersey. Moreover, the Solicitor General overlooks the case of *Hackensack Water Co.* v. *Board of Public Utility Commissioners*, 96 N.J.L. 184, 115 Atl. 528 (1921), which indicates that the New Jersey utility involved considered it necessary to file an application with the New Jersey Commission to determine whether the contract rate was unjust or discriminatory before it could increase the rate.

Washington. In *North Coast Power Co.* v. *Public Service Comm.*, 114 Wash. 102; 194 Pac. 587 (1921), the Supreme Court of Washington had before it a State statute which in addition to containing filing provisions similar to those contained in Section 4 of the Gas Act, contained a special provision to the effect that "all contracts in force at the date this Act takes effect should remain in force," subject only to the power of the Commission in its discretion to order such contracts abrogated. The Commission had construed this provision as requiring such affirmative action by it before the rates in any contract, including a contract entered into *after* the adoption of the Public Service Commission Law, could be increased. The Supreme Court of Washington held that the provision requiring affirmative action by the Commission before contracts could be set aside applied only to contract entered into before the adoption of the statute and that therefore contracts entered into thereafter were subject to the right of

the company to increase the rates when necessary in order to enable it to render sufficient service, subject only to the right of the Commission to set aside the proposed increases if they were found to be exorbitant. In other words, the Court held that because the statute expressly provided that only pre-existing contracts could not be set aside without affirmative action by the Commission, contracts subsequently entered into were not so protected.

New York. The Solicitor General makes much of the cases of *Town of North Hempstead* v. *Public Service Corporation*, 231 N. Y. 447, 132 N.E. 144 (1921) and *Public Service Comm.* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, 133 N.E. 427 (1921) but he overlooks the fact that it was only with the greatest reluctance that the Court of Appeals upheld the right of a public utility to increase rates established by a franchise with a municipality by a mere filing, for as it said in the North Hempstead case:

> "This method of increasing rates without first obtaining an adjudication as to their reasonableness may appear * * * 'defective and illogical, * * *'" (231 N. Y. at 451, 132 N.E. at 445).

He also overlooks the fact that in *Matter of Dry Dock, E.B. & B.R.R. Co.*, 254 N. Y. 305 172 N.E. 516 (1930) the same Court refused to follow those cases. In that case, Judge Lehman, writing for a unanimous Court, called attention to the reluctance with which the Court had reached its decisions in the *Hempstead* and *Pavilion* cases, and continued:

> "Certainly we may not strive, by forced constructions of the language of the statute, to find a legislative intent to authorize a method which 'may appear defective and illogical.'" (254 N. Y. at 313, 172 N.E. at 519)

The Court then limited the *North Hempstead* and *Pavilion* cases to the precise circumstances under which they arose.

and refused to permit the contrac rate involved in the *Dry Dock* case to be increased by a mere filing.

Colorado. Concededly, the two cases cited by the Solicitor General (*City of Lamar* v. *Town of Wiley*, 80 Colo. 18, 248 Pac. 1009 (1926) and *Denver & So. Platte Ry. Co.* v. *Englewood*, 62 Colo. 226, 161 Pac. 151 (1916) hold that under the regulatory statute existing in Colorado a contract rate may be increased by a mere filing of new rate schedules. But we find it difficult to understand these decisions, in view of the decision of the same Court in *Ohio and Colorado Smelt. & R. Co.* v. *Public Utilities Commission*, 68 Colo. 137, 187 Pac. 1082 (1920), which was decided shortly after the *So. Platte* case and before the *City of Lamar* case. In that case a power company filed a petition with the Public Utilities Commission asking permission to increase its contract rates on the ground that they were confiscatory. The Commission, after hearing, held that the contract rates were discriminatory, set them aside, and ordered increases. The Supreme Court of Colorado reversed the Commission on the ground that the evidence did not support the finding that the rate was preferential and discriminatory, saying:

> "The sole reason for holding that the power rests with the Commission to increase or decrease a rate stipulated in a contract * * * is that the public welfare demands it in the specific case.
>
> "Therefore the Commission, with the delegated legislative power of the State, must determine that the rate fixed in the contract is detrimental to the public weal. This is the exercise of a very grave and dangerous power and should be asserted with the greatest caution, and by means of every instrumentality at the command of the Commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare." (68 Colo. 137 at 147, 187 Pac. 1082 at 1086)

We find it difficult to reconcile these well-recognized and indisputable principles with the same Court's decisions in the two cases cited by the Solicitor General, which ruled that an existing contract could be abrogated by the utility company itself by a mere filing of new schedules and without any finding by the Commission that the contract "injuriously affects the public welfare."

Pennsylvania. Concededly, the two cases cited from the State of Pennsylvania by the Solicitor General sustain the proposition that a rate contract may be changed by the mere filing of a new schedule, without any finding as to the reasonableness of the contract.

It thus appears that at the most, the courts of only two States, Colorado and Pennsylvania, sustain the contentions of the petitioner, and, as we have seen, the position of the Colorado courts on this issue appears somewhat incongruous. On the other hand, a majority of State cases clearly and directly uphold the principles laid down by this Court in the *Wichita* case and by the three Circuit Courts in the cases hereinabove cited (pp. 34 to 40, *supra*).

We might also point out that there are undoubtedly many State Commissions which construe their regulatory statutes in accordance with the principles established by those decisions, so that the issue has never reached a court of law. As will appear in the brief to be submitted in the *Sierra* case, that is the established practice of the California Commission. An examination of the Public Service Reports of Idaho will show that the Commission in that State considered that rates in a contract could only be changed after a hearing and finding that the contracts were unreasonable (*Caple* v. *Interstate Utilities Co.*, PUR 1930 A. at page 18). While we have not searched all of the records of all State Commissions, we think it is a reasonable assumption that the majority of the other State Commissions also recognize that a contract solemnly

entered into for a valuable consideration to sell power at a fixed rate for a term of years is more than a mere scrap of paper.

As indicated in the beginning of this Point, we do not think the citation of authorities from State courts, or even from this Court, when dealing with the construction of State statutes as they have been construed by State courts, is of much assistance in construing the Natural Gas Act. However, we think it must be clear from the foregoing discussion that the repeated statements appearing in the briefs of both petitioners that the "overwhelming" weight of authority sustains their contentions are without foundation.

D. The records of the Commission show that the instant case and the *Sierra* case are the only cases in which the Commission has followed the procedure of permitting contract rates to be increased by merely filing a new schedule, over the objection of the purchaser.

In support of his contention that "the Commission's opinions and orders make clear that it has consistently followed the filed rate procedure in circumstances such as are here involved" (C. Br. p. 35) the Solicitor General cites primarily orders of the Commission entered after a hearing and finding of unreasonableness under Section 5(a), or orders approving increases filed under Section 4(d) which had not been affirmatively objected to by the purchaser. The only orders cited in which the Commission approved such increases over the contract purchaser's objection are the orders in the instant case and the *Sierra* case.

For example, the order of the Commission approving an increase in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 1044 (1947), cited at page 35 of the Solicitor General's brief, merely approved an increase filed pur-

suant to an order of the Commission entered the preceding day after a hearing under Section 5(a), which found existing contracts to be discriminatory. Moreover, the cited order merely continued rate increases which had been previously agreed upon by the parties to the contracts. The proceedings were instituted in 1946-7 after it appeared that Panhandle had entered into contracts calling for the sale of more gas than it was physically able to deliver over its pipe line. After elaborate hearings before the Commission under Section 5(a), emergency rules and regulations apportioning available gas among the purchasers holding contracts were ordered by the Commission, with the approval of all of Panhandle's utility customers. (*City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946)). One of the methods of correcting Panhandle's gas shortages approved by this order embodied the acceptance of an offer by one of Panhandle's contract customers, Ohio Fuel Gas Company, to give up its contract right to 20,000 MCF of gas per day, in consideration of a payment to it of 4½¢ per MCF for the amount released. The reason for this proposal was that Ohio Fuel was in a position to obtain an equivalent amount of gas from the Big Inch line of Texas Eastern Transmission Corporation, with which it was also connected, but at a rate which was 4½¢ per MCF higher than the rate under which it could obtain the same gas under its contract with Panhandle. In order to take advantage of this offer, the interruptible customers of Panhandle, whose supplies of gas would be the first to be cut off in view of Panhandle's shortage, agreed to pay this additional amount over and above the rate provided in their contracts for the gas furnished them by Panhandle, and this increase was embodied in the order (*City of Detroit* v. *Panhandle Eastern Pipeline Co.*, 6 FPC 119 (1947)).

The following year, 1947-8, it became impossible to obtain a general agreement among all of Panhandle's

customers. Accordingly the Commission again entered into hearings under Section 5(a), in an effort to find a solution of the emergency. On November 25, 1947, the Commission issued a long opinion and order stating that as a result of its extended hearings the Commission had found that "* * * during the existing emergency gas shortage situation the Panhandle rate schedules now on file * * * are * * * unjust, unreasonable, unduly discriminatory and preferential in violation of Section 4(b) of the Natural Gas Act." The Commission then found that:

> "The authority of the Commission to prescribe the emergency rules and regulations as classifications, rules, regulations or practices, in connection with a rate schedule, to prevent discrimination under section 5(a) of the Natural Gas Act, is fully sustained by the decision of the United States Supreme Court in the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, where analogous authority of the Interstate Commerce Commission was brought into question." (6 FPC 196, at 204 (1947))

The Commission staff and Panhandle had presented various plans to solve this problem, which involved certain rate increases. The Commission, however, rejected these plans, saying:

> "However, this method of enforcement would appear in this case to involve an increase in rate. Under section 5(a) of the Natural Gas Act the Commission is prevented from ordering any such increase in the absence of the filing of a new schedule providing for the increase." (6 FPC 196 at 216 (1947))

On the following day the Commission issued the order on which the Solicitor General relies (*City of Detroit* v. *Pan-*

Panhandle Eastern Pipe Line Co., 6 FPC 1044 (1947), approving a schedule of increased rates filed by the company embodying the 4½¢ increase which the interruptible customers had agreed to for a previous period. Obviously, the increase was made after hearings and findings under 5(a). True, the filing of the increased rate was made under Section 4(d), but that is just what is contemplated by the provision of Section 5(a) that *after* an existing rate or contract has been found to be unreasonable no *increase* can be ordered except in accordance with a rate filed by the company itself. The contract having been set aside by the Commission under 5(a), the company was free to file the schedule of increases under 4(d) and had no choice but to do so, as the existing rates had been found unreasonable, discriminatory and preferential.

Panhandle Eastern Pipe Line Company, 9 FPC 443 (1950), also cited by the Solicitor General, relates to the same general problem. The Commission's authority to make orders limiting the amount of gas to be delivered to contract customers under Sections 4 and 5 of the Natural Gas Act was challenged and the Commission correctly asserted that it had such power. There can be no doubt of the Commission's power to make such orders after appropriate hearings and findings under 5(a).

The Solicitor General concedes that in *Re Mississippi River Fuel Corp.*, 2 FPC 170 (1940), the purchaser had agreed to the increase. He says that nevertheless it shows that, as far as the Commission was concerned, the Commission "made no distinction between changes sponsored by the gas company alone and those agreed to by the purchaser" (C. Br. pp. 36-37). We think it shows simply that the Commission recognized the right and duty of the company to file proposed changes which had been agreed to by the purchaser, under Section 4(d). The same comment is applicable to most of the other cases

cited on pages 36 and 90 of the Commission's brief. The Solicitor General at page 90 argues that the reason the purchasers did not object was that "the purchasing company accepted without question the propriety of the Commission's following of that procedure." We think it must be obvious that where a purchaser does not object to an attempt by the company to increase a contract rate in reliance upon which the purchaser has made substantial commitments, the reason is that the proposed increase has previously been negotiated and agreed to between the parties to the contract. But in any event, none of these cases deals with a situation where the purchaser affirmatively objected to the increase, as did Mobile in the instant case and Sierra in the *Sierra* case, so that the issue here presented was not raised in those cases.

That the Commission itself as recently as October 30, 1948, recognized that valid rate contracts were permissible under the Natural Gas Act and could be changed only by agreement of the parties, is also apparent from the Commission's Order No. 144 promulgated on that date, quoted in footnote No. 6, on pages 5-6 of United's brief. As heretofore indicated, the purpose of the regulations made effective by that order was to require that all effective rate schedules and contracts providing for payment on a percentage basis should be restated in dollars or cents per unit, without affecting any change in the resulting rates. Section 154.85 of the new regulations provides that, except as required by the conversion provisions:

> "Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be construed as an executed service agreement * * * until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff. * * * *Provided, further, however*, That agreements in-

tended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

That the Commission itself recognized that valid rate contracts were permissible both under the Act and under that Regulation is apparent from its own construction of the effect of the regulation:

> "The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." (Federal Power Commission Order issued December 21, 1948, CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951 Decisions, ¶9090.)

Thus it is entirely incorrect to assert, as both petitioners repeatedly do assert, that the Federal Power Commission has consistently treated contracts as voidable at will by a gas company by unilateral action under the filing procedure provided for in Section 4(d). On the contrary, it is clear that until the instant case and the *Sierra* case were presented before it, the Commission has at all times recognized that private rate contracts for the sale of natural gas were valid and binding between the parties, and in the absence of Commission action could be modified only by agreement between the parties.

IV

There can be no doubt of Mobile's right to recover the excess charges unlawfully collected by United under the Commission's order.

United devotes some nine pages of its brief to establishing the proposition that the refund provisions of Section 4(e) of the Act are not applicable to rate increases instituted by a filing under Section 4(d) unless the effective date of the increases has been suspended by the

Commission under 4(e). We submit that this is a strained and highly illogical construction of the provisions of Section 4(e). An examination of the section will show it can be equally well construed as permitting refunds in all cases where a filed rate is rejected by the Commission as unreasonable after it has become effective, regardless of whether that occurred in thirty days or five months after it was filed. We can see no possible reason for holding that Congress intended to permit a company to charge exorbitant or illegal rates, without any obligation to refund the excess when the rate has been duly found to be illegal, simply because the effective date was not or could not be suspended, in the absence of unequivocal language requiring such a construction.

But in any event, we think the Court below was correct in holding that it was unnecessary to pass upon this question in view of the fact that the order permitting the increase to go into effect was void, and that therefore "any moneys, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile" (A. 155).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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In the Supreme Court of the United States

FEDERAL POWER COMMISSION, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cause on September 7, 1954.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 25-46) is reported at 215 F. 2d 883. The pertinent opinion and order of the Federal Power Commission is set out in the Appendix to the Petition in No. 436 at pp. 18-23.[1]

[1] In No. 436, United Gas Pipe Line Company is seeking review of the same judgment of the Court of Appeals for the Third Circuit. The record here is the same as in No. 436, so that our references will be to the record as it appears in that case.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1954 (App. A, *infra*, p. 47). By order of Mr. Justice Burton dated November 29, 1954, the time for filing a petition for a writ of certiorari was extended to and including February 4, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTION PRESENTED

Whether under the Natural Gas Act the Federal Power Commission may accept for filing and permit to become effective a schedule increasing a gas company's rate for the sale for resale of natural gas to an industrial user, pending a hearing as to its reasonableness, where the existing rate is embodied in a contract between the gas company and the purchaser, filed with the Commission as a rate schedule, and the purchaser has not agreed to the increase.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et seq.* are set out in Appendix B, *infra*, pp. 48-51.

STATEMENT

Mobile Gas Service Corporation, an Alabama public utility, contracted, on January 1, 1936, with the predecessor of the present United Gas Pipe Line Company for the purchase of natural gas for resale by Mobile to domestic and industrial users (R. 13, 33, 111-132).[2] In 1941 the contract was amended to

[2] With the enactment of the Natural Gas Act, this contract was filed with the Federal Power Commission as Rate Schedule No. 20 (R. 13).

provide that United should supply Mobile's requirements of gas for industrial resales at a rate of 90% of the proceeds received by Mobile but not less than 16¢ per MFC unless United consented in writing (R. 13, 133-145).[3] In 1946, United agreed with Mobile to reduce its price on a portion of Mobile's industrial resales to Ideal Cement Company to 80% of the proceeds (R. 5, 13-14).[4] About the same time, Mobile contracted for a ten-year period to supply Ideal with natural gas at a fixed rate of 12¢ per MCF (R. 5, 13). Subsequently, in May 1952, United filed with the Commission its Gas Tariff Original Volume No. 1, substituting for the percentage rate provided in the 1946 agreement, the equivalent flat rate of 10.7¢ (R. 5, 14-15).[5] (Mobile's rate to Ideal remained at 12¢ per MCF.)

On June 24, 1953, United filed rate schedules with the Commission, whereby it proposed to increase the rates for a number of its sales to various customers, including Mobile (R. 3, 15, 34). Among these new schedules for sales to Mobile were an increase in the rate for the Ideal resales from 10.7¢ to 14.5¢ per MCF (R. 3, 15, 34). United further requested that the effective date of these new schedules be July 15, 1953 (R. 3, 91), which the Commission, by order dated July 10, 1953, refused to grant

[3] This amendment to the contract was filed with the Commission as Supplement No. 7 to Rate Schedule No. 20 (R. 76-77).

[4] An amendment embodying this contract was filed with the Commission as Supplement No. 10 to Supplement No. 7 (R. 5, 33-34, 77-78).

[5] This was done to comply with the Commission's requirement that all United's rates be converted from a percentage to a dollars and cents basis (R. 34).

(R. 3, 92). Noting that United's increased rates "* * * * have not been shown to be justified and may be unjust and unreasonable or otherwise unlawful" (R. 91), the Commission consolidated the proceeding with other pending proceedings involving United and fixed July 20, 1953, as the date for hearing on the reasonableness of the proposed rates (R. 3, 93). In addition, the Commission suspended until December 25, 1953, all of the increases proposed by United (including those to Mobile) which it was authorized to suspend under Section 4(e) of the Gas Act, *infra*, pp. 49-50 (R. 94). Since, however, rates for sales for industrial resales were not suspendible, the Commission postponed the effective date for the new schedule for the Mobile-Ideal sale until July 25, 1953, the last day of the thirty-day notice period provided in Section 4(d), *infra*, pp. 48-49 (R. 94).

On July 16, 1953, Mobile moved to intervene in the consolidated hearings (R. 16). On August 7, 1953, Mobile, amending its petition previously filed in the consolidated proceedings to invoke a separate proceeding (R. 4, 26-27), requested the Commission: (1) to annul and set aside that part of the July 10 order permitting the filing of the new rate schedules for Mobile-Ideal sales and instead to reject the filing on the ground that the United-Mobile contract cannot be abrogated by United's unilateral action without a hearing and determination by the Commission that the existing rates were unjust and unreasonable; (2) if rejection is denied, to order a separate hearing on the lawfulness of

the higher rates filed by United for the Mobile-Ideal sales; and (3) to direct United to refund to Mobile the difference, if any, between the rates proposed by United and those finally determined by the Commission (R. 10-24).

In denying Mobile's petition, the Commission held first that United's filings could not be rejected because they were made in conformity with the Commission's Regulations and Section 4 of the Gas Act, the only section under which a gas company could initiate a rate increase (R. 5-6). The Commission further ruled that no good cause was shown for a separate hearing; in the Commission's experience, the consolidated hearings, which had already begun, were more practical since the reasonableness of the rate for the Mobile-Ideal sale raised issues common to other rates involved in the consolidated hearings (R. 6-7). Finally, the Commission held that it had no power to order refunds in the case of sales for resale for industrial use, since the rates for such sales are not suspendible under Section 5(e) (R. 7-8).

Upon denial of its petition for rehearing (R. 52-62, 63-64), Mobile sought review in the Court of Appeals for the Third Circuit (R. 65-74). The court below (per McLaughlin, J.) reversed the Commission's order and directed it to reject the filing of United's proposed increases for the Ideal resales, since United's action had been taken before a Commission's determination, made after a hearing, that the existing rates were unjust and unrea-

sonable (App. A, pp. 25-46).[5] Judge Hastie dissented (App. A, p. 46).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that, since United's existing rate for the Mobile-Ideal industrial resale was established in a contract between United and Mobile, the Commission was without authority to permit the rate increase proposed by United to become effective in the absence both of Mobile's consent and of an administrative determination, made after hearing, that the existing rate is unjust and unreasonable. This holding is contrary to the clear and unambiguous language of Section 4(d) and (e) of the Natural Gas Act, *infra* pp. 48-50, and in conflict, at least in principle, with the prior decision of the same Court of Appeals in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, as well as with the recent decision of the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, C.A. 5, No. 15034, decided November 24, 1954. Moreover, apparently influenced by its unwarranted feeling that the Commission's result was inequitable to Mobile, the court has accorded to the United-Mobile contract an unmerited dignity and erroneously character-

[5] In view of this holding, the court did not reach the question (also raised by Mobile) whether, assuming the proposed increase could become effective prior to a determination as to its reasonableness, the Natural Gas Act authorized the Commission to order refunds should the new rate for the industrial resales be found to be unreasonable (App. A, p. 45). Consequently, this question is not involved in the present posture of the case.

ized as "radical" a procedure which has been consistently followed by the Commission in its administration of the Natural Gas Act as well as the Federal Power Act, and is also a recognized technique adopted by many states in their public utility regulatory statutes. Further, the holding below, if not corrected, will result in a substantial increase in the administrative burden on the already overloaded Commission. Review by this Court is therefore clearly justified.

1. (a). The court below has failed to distinguish between the two separate and distinct rate procedures provided in Sections 4(d), 4(e), and 5(a) of the Natural Gas Act—"the heart of the new regulatory system" (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 611). Sections 4(d) and (e), *infra*, pp. 48-50, set out the so-called "filed rate" procedure, which is applicable when a natural gas company itself initiates rate changes,[7] and, on the other hand, Section 5(a), *infra*, pp. 50-51, provides the governing procedure for rate changes initiated by someone other than the natural gas company.[8] Under Sections 4(d)

[7] The rate filed by a natural gas company pursuant to Section 4(d) is, upon becoming effective, the legal rate, enforceable in the same way as a Commission determined rate. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, holding (at 251):

> [Petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

[8] Section 5(a) permits the invocation of the procedure there provided upon the Commission's "own motion or upon complaint of any State, municipality, State commission, or gas dis-

and (e), hearings are not mandatory, but if ordered by the Commission, they relate to the reasonableness of the *proposed increase;* Section 5 requires hearings at which the Commission is to consider the reasonableness of the *existing rate.*

Thus, when United filed its proposed increases, the Commission had no choice but to follow, as it did, the procedure prescribed in Sections 4(d) and 4(e). As authorized by Section 4(d), the Commission refused to permit the proposed rate increases to be effective prior to the expiration of the thirty-day notice period, and, on its own initiative, it "enter[ed] upon a hearing concerning the lawfulness of such rate, charge, classification, or service" (Section 4(e), *infra*, p. 49; see *supra*, pp. 3-4). In addition, "pending such hearing and the decision thereon," the Commission suspended the operation

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tributing company * * *," *infra*, p. 51. Natural gas companies are significantly omitted from this enumeration.

In this connection, it may be noted that the scheme evolved by the court below would, if adhered to literally, preclude all rate increases. For the court in effect denied that rates may be increased under Sections 4(d) and (e). And there can be no rate increases under Section 5(a) if the gas company's filing is rejected since that Section expressly prohibits the Commission from ordering "any increase in any rate * * * unless such increase is in accordance with a new schedule filed by such natural gas company." See *infra*, p. 51. Since the gas companies would thereby be unable to recover increased legitimate costs from customers under contract, they may be forced to try to recover these costs from subsequent customers. The result could well be discrimination against new customers in favor of those who had signed contracts at an earlier date. On the other hand, if the Commission should refuse to permit the discrimination, as expressly forbidden under Section 4(b), then the gas company would be required to absorb all increases in costs, and confiscation might result.

of those new schedules which were suspendible for five months beyond the date they would otherwise be effective (Section 4(e) *infra*, p. 49; see *supra*, p. 4); but since the suspension of "the rate * * * for the sale of natural gas for resale for industrial use only" is expressly prohibited by Section 4(e), the Commission was powerless to prevent the proposed increase for the Mobile-Ideal sale from becoming effective at the end of the thirty-day notice period.[9]

Nor is the appropriate procedure in any way affected by the circumstance that the rate which the gas company proposes to supersede is embodied in a contract filed with the Commission as a rate schedule and the purchaser has not agreed to the change. There is nothing in Sections 4(d) and 4(e) or Section 5(a) to support any inference that these considerations are relevant in determining whether Sections 4(d) and 4(e), or 5(a) is applicable.[10]

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[9] There is no question—and the court below suggested none—as to the constitutionality of the filed rate procedure under which, without prior hearing, rates may become effective and vary private contract rights. Cf. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U.S. 109, 112-113 and cases there cited at fn. 4; see also *Sutter Butte Canal Co.* v. *Railroad Commission of California*, 279 U.S. 125, 137-138; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U.S. 372, 375-377.

[10] It is established generally that contract rights are subject to the Natural Gas Act and that no special procedure need be followed because a private contract is involved or affected. See *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C.A. 5), certiorari denied, 332 U.S. 770; *Watab Paper Co.* v. *Northern Pac. Ry. Co.*, 154 F. 2d 436 (C.A. 8); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (C.A. 6); *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 121 F. 2d 159 (C.A. 8).

On the contrary, the Act allows no such distinction. The first sentence of Section 4(d), *infra*, p. 48, defines that and the succeeding subsection (e) as applying to "any such [11] rate, charge, classification, or service, or * * * any rule, regulation or *contract relating thereto*" (emphasis added).[12] This language is indistinguishable for present purposes

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[11] The "such" refers back to Section 4(c) which provides:

> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all *contracts* which in any manner affect or relate to such rates, charges, classifications, and services. [Emphasis added.]

[12] That Section 4(d) does not impose an *obligation* upon a gas company to initiate rate changes which might be contrary to its contract with the purchasing company is immaterial. The problem concerns the proper action to be taken by the Commission once a gas company has undertaken to initiate such rate changes. As we show in the text, the Commission in such circumstances has no discretion and is required to follow the procedure set out in Sections 4(d) and (e). In addition, it may be noted that it is well recognized that "[o]ne of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions * * *." *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light and Power Co.*, 184 F. 2d 552, 567 (C.A. 4), certiorari denied, 340 U. S. 906; see, also, *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 458-459; *Gibbs* v. *Baltimore Gas Co.*, 130 U.S. 396, 410-411.

from the language of Section 5(a), *infra*, pp. 50-51.[13] Thus, the Act on its face refutes the result below that Section 5(a), rather than the filed rate procedure of Sections 4(d) and 4(e), is applicable to rate increases, proposed by a gas company, solely because of the form of the existing rate or the lack of the purchaser's assent. Cf., *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388, 390-391 (C. A. 5), certiorari denied, 332 U. S. 770.

(b). The holding of the Court of Appeals also ignores the Commission's consistent practice of following the filed rate procedure in circumstances such as are here involved. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F. P. C. 1044, petition for review dismissed, 170 F. 2d 150 (C. A. 8); *Re Panhandle Eastern Pipe Line Co.*, 9 F. P. C. 443, 444-446; *Re Mississippi River Fuel Corp.*, 2 F. P. C. 170, 175-176, affirmed, 121 F. 2d 159 (C. A. 8); see also *City of Los Angeles* v. *Nevada-California Electric Corp.*, 2 F. P. C. 104, 108-109; and *Pacific Gas and Electric Company*, F. P. C. Docket

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[13] Section 5(a) provides in pertinent part:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or *contract affecting such rate, charge, or classification* is unjust, unreasonable, unduly discriminatory, or preferential . . . [Emphasis added.]

No. E-6482, order issued June 17, 1954, pending on petition for review, *sub nom. Sierra Pacific Power Co. v. Federal Power Commission*, C. A. D. C. No. 12430 (both applying the similar filed rate provision contained in Section 205 of the Federal Power Act). This consistent practice is, under well established principles, entitled to considerable weight. See, *e. g., United States v. Public Utilities Commission of California*, 345 U. S. 295, 315; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315.

Furthermore, the result below disregards the Act's legislative history which reveals that even prior to the Act's passage the Commission construed the substantially similar provisions of a predecessor bill as permitting a gas company to initiate rate increases without Commission hearing and the Commission's General Solicitor so apprized Congress. See Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., pp. 28-29.[14]

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[14] MR. LEA: Mr. DeVane, under what conditions would rates be put into effect? That is, what would be the procedure? MR. DEVANE: In the beginning? MR. LEA: Yes. MR. DEVANE: The companies will simply file their schedules. MR. LEA: And those schedules would prevail unless the Commission saw fit to after a hearing and notice, establish a rate? MR. DEVANE: Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing are the rates that will continue in effect until they are changed either by the company as provided in section 4, or by the Commission after hearing. . . . MR. COOPER: And anyone who wants to file a complaint goes to the Commission; is that right? MR. DEVANE: That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under Section 4(d). After they have filed them with the Commission and an-

(c). In characterizing the Commission's reading as being of "a radical nature" (App. A, *infra*, p. 45), the court below overlooked the fact that the filed rate procedure provided in Sections 4(d) and (e) is in large measure modeled upon comparable provisions of the Interstate Commerce Act, 49 U. S. C. 15(7). *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 806-807 (C. A. 4); cf. *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 236 Fed. 573 (S. D. Ga.), affirmed, 239 Fed. 718 (C. A. 5); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E. D. Va.—three judge court); see also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370. In addition, there are numerous decisions revealing similar interpretations of analogous provisions of state public utility regulatory statutes which make widespread use of the filed rate procedure. See, *e. g.*, *Harrison Electric Co.* v. *Citizens Ice & Storage Co.*, 149 Ark. 502, 506-507; *Denver & South Platte Railway Co.* v. *City of Englewood*, 62 Colo. 229, writ of error dismissed, 248 U. S. 294; *Antioch Milling Co.* v. *Public Service Co. of Northern Illinois*, Ill. Sup. Ct. (Docket No. 33254-Agenda 34-September, 1954); *Kansas City Light & Power Co.* v. *Midland*

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nounced those new rates, the Commission has the power to suspend and investigate, and the suspending power extends for a period of 5 months.

In this connection, it may be noted that the legislative excerpt quoted by the court below (App. A, pp. 39-40) does not treat with the instant situation, but rather with a contemplated complaint by a state utility commission as to the reasonableness of existing rates, a situation in which Section 5(a) is applicable. See, *supra*, pp. 7-8.

Realty Co., 338 Mo. 1141, affirmed, 300 U. S. 109; *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146; *North Hempstead* v. *Public Service Corporation*, 231 N. Y. 447; *Public Service Commission* v. *Iroquois Natural Gas Co.*, 171 NYS 379, affirmed by memorandum opinion 226 N.Y. 580; *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243.

In each of these cases, the purchaser complained, as does Mobile here, that since the existing rate was embodied in a contract, the increases by the utility company could not be operative prior to a determination of reasonableness by the regulatory commission, and in each instance the highest court of the state rejected the contention. As stated by the Arkansas Supreme Court more than thirty years ago, in *Harrison Electric Co.* v. *Citizens Ice & Storage Co.*, *supra*, at 506-507:

> * * * Nor does the statute require an affirmative order of the commission authorizing that the new rates be put into effect. The rates become effective upon the maturity of the period of thirty days specified in the schedule, unless there is an order of the commission suspending the rates pending a hearing.
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> * * * * * *
>
> We are of the opinion, therefore, that the schedule of increased rates promulgated by appellant was valid, and, the statute having been complied with, the new rates superseded any contractual rates theretofore established between the parties. There could be no valid

contract as against the power of public control by the commission. It would not constitute an impairment of the obligation of the contract for the new rates to be put into effect under the control of the Commission.

There is thus "nothing novel in [the] provisions" (App. A, *infra*, p. 41) of Sections 4(d) and (e) as construed by the Commission; instead, as so construed, they contain no more than "the usual provisions. * * * such as we find in all regulatory measures enacted by Congress" (App. A, *infra*, pp. 40-41). The reference below (App. A, *infra*, p. 37) to *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, which dealt with an entirely different problem, is plainly inapposite.[15]

(d). The Court of Appeals placed considerable reliance upon *Wichita Railroad* v. *Public Utilities Commission*, 260 U. S. 48, and *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1 (App. A, *infra*, pp. 33-34). But both these cases involved a Kansas statute which—contrary to the statement of the court below (App. A, *infra*, p. 34)—differs in several critical respects from the Natural Gas Act.[16] Significant among these differences are that (1) the Kansas statute specifically prohibited the

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[15] The question in *Niagara Mohawk* was whether the Federal Water Power Act of 1920 had abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes.

[16] *Hinkel Dry Goods Co.* v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (C. A. 10), also cited below (App. A, *infra*, p. 39), involved the same Kansas statute.

utility company from changing its rates without the consent of the state commission, and (2) the Kansas statute contained no provision either for rate changes to become effective with or without commission action (compare the Gas Act's Section 4(d)) or for commission control of the changes pending commission action (compare the Gas Act's Section 4(e)). Cf. *Kansas City Light & Power Co.* v. *Midland Realty Co.*, 338 Mo. 1141, 1150-1151, affirmed, 300 U. S. 109. Moreover, in light of this Court's reference in the *Wichita Railroad* case only to Illinois cases in connection with the statement that "[t]his conclusion accords with the construction put upon similar statutes in other States" (260 U. S. at 58), it is significant that in the recent *Antioch Milling Co.*, case, *supra*, p. 13, the Illinois Supreme Court (after describing the present Illinois statute in terms showing it to be similar to the Gas Act) stated:

> This language seems clearly to contemplate that the Commission shall analyze a proposed rate change, and reach a conclusion as to whether it is to be permitted to go into effect without a formal hearing, or whether it is to be suspended until a formal hearing has been had. That this is what the section means is confirmed by the fact that an earlier provision, which unmistakably required the commission to make findings before a rate increase to become effective, has been repealed. * * *

The court below also relied upon *Colorado Interstate Gas Co.* v. *Federal Power Commission*,

142 F. 2d 943, 954 (C. A. 10), affirmed, 324 U. S. 581 (App. A, *infra*, pp. 35-37). However, when read in context, the quoted excerpt has no bearing on the instant problem. When the Tenth Circuit stated in *Colorado Interstate* that "[t]he passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. * * * Such rates and charges could be modified only after an express finding of unreasonableness" (see App. A, *infra*, p. 36), the court had before it a Commission rate order issued after a Section 5(a) proceeding and was concerned only with whether there was substantial evidence to support the Commission's conclusion. The Tenth Circuit did not hold, nor could it have held consistently with the Gas Act, that a hearing must be had in every case where existing contract rates will be affected by proposed rate changes.

2. The holding below also conflicts, at least in principle, with the prior decision of the Third Circuit in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899. In that case, the Commission, without hearing, rejected the filing of the gas company's new rate schedules on the ground that the proposed increases were unwarranted. The Third Circuit in an opinion by Judge Hastie, the dissenting judge in the instant case, reversed the Commission's action, holding (202 F. 2d at 902):

> * * * On the face of Section 4 of the Natural Gas Act * * * it is clear that, Mississippi's proposed tariff changes having been

duly filed, the Commission had only two alternatives. By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. It purported to follow a third course, rejection without hearing —a course for which it cannot show even color of statutory authority.

The observation in the opinion below that "the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates" (App. A, *infra*, p. 46) cannot be reconciled with the holding in the *Mississippi* case that that procedure was one "for which it [the Commission] cannot show even color of statutory authority". The Commission cannot simultaneously accept a new rate filing pending a hearing as to reasonableness (as it was held required to do in *Mississippi*), and reject the filing because no hearing has as yet been had (as the ruling below requires it to do).[17]

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[17] The court below purported to distinguish the *Mississippi* case by relying on Commission Regulation 154.85 (18 C. F. R. 154.85) which requires that '*agreements* intended to effect a change or amendment in [an existing] contract may be made only by the execution of a form of service agreement contained in the tariff" (emphasis added) (App. A, *infra*, pp. 43-44). United's June 24, 1953 rate filing was construed by the court to be an "attempt 'to effect a change' in an unexpired contract without 'the execution of a form of service agreement

The result below is also at odds with the views expressed by the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (C.A. 5, No. 15034, decided November 24, 1954). (See App. to Brief in Opp. in No. 436.) There a company purchasing natural gas under a contract with United sought an injunction against United's proposed rate increases on grounds virtually identical to those adopted below. While the Fifth Circuit indicated that the holding of the court below supported its affirmance of the denial of an injunction insofar as it required resort to the Commission, not the courts, for relief (App. to Br. in Opp. in No. 436, p. 9a), on the issue of the proper interpretation of the Gas Act, the Fifth Circuit, in flat contradiction to the conclusion below, stated (App. to Br. in Opp. in No. 436, p. 9a):

> * * * the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme.

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contained in the tariff." (App. A, *infra*, p. 44). Therefore, although the gas company had complied with all filing requirements in the *Mississippi* case and its filing could not be rejected, United, according to the court, had not complied with all filing requirements and its filing must be rejected (*ibid.*). But this distinction is based on an erroneous reading of the regulation. Section 154.85 requires that all *agreements* intended to effect a change must be made on a form of service agreement. United's filing on June 24, 1953 clearly was not an *agreement*, as is evident from Mobile's protestations, and therefore there was no need to comply with Section 154.85. There is, then, no distinction between the instant case and the *Mississippi* case; in both, all filing requirements were met.

> So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should * * * restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the court cannot do.

3. Apparently underlying the ruling below is the court's feeling that the result reached by the Commission was inequitable. The court recognized that the rate set in the United-Mobile contract could be increased pursuant to a Commission determination made after hearing, despite the resulting "squeeze" on Mobile. However, it seemed to feel that in view of Section 4(e)'s express prohibition against suspension of rates for sales for industrial resale, it would be unfair to Mobile to permit the increase to be operative during the pendency of the Commission hearing, particularly if the Commission should ultimately determine that the proposed increase was unjustified.

This inequity may, however, be more fanciful than real. As far as we have been able to ascertain, Mobile has not made any effort to eliminate, or even alleviate, the "squeeze" by seeking an increase in its rate to Ideal either before the state regulatory agency or otherwise—a "squeeze" which, it may be noted, will persist should the Commission approve the proposed increase as it concededly has the power to do. Moreover, while Mobile may lose on its Ideal resale, that loss may, in substantial measure, be offset by the fact that United's proposed in-

creases on its other sales to Mobile were suspended by the Commission for the five months authorized by Section 4(e), with the result that, even should the Commission determine that the increases requested by United were justified in full, Mobile would have been freed from paying the increased rates on the other sales during the period of suspension. See *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C.A. 4).

It is such rough balancing that Congress apparently had in mind in prohibiting the suspension of sales for resale for industrial uses. When a gas company files proposed increased rates, the Commission makes a preliminary determination whether to permit the increases to be effective without hearing or to enter upon a hearing. Should it decide upon a hearing, the problem then arises as to what rates should prevail during the pendency of the hearings. Continuance of the old rates would be inequitable to the gas company if the Commission finally concluded that the proposed increases were justified. Permitting the new rate to be effective during the administrative hearing would, however, be unfair to the purchaser if the increases are rejected. Because of the time needed to pass upon new rates, such losses constitute a "necessary incident of rate regulation" (*Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 809 (C.A. 4)). But in order to establish some equitable allocation of these possible losses between the gas company and its purchasers, Congress provided in Section 4(e), on the one hand, that rates for sales for resale other than for industrial use

may be suspended for five months and then be effective under bond subject to refund, and, on the other hand, that rates for industrial resales should not be subject to suspension at all.

While it may be that the delays inherent in processing the heavy volume of proposed rate increases have resulted in imposing an undue burden on purchasers of natural gas for industrial resales, the defect in the Act is one which "must be cured, if at all, by the Legislature." *Public Service Commission* v. *Iroquois Natural Gas Co.*, 171 N.Y.S. 379, 381, affirmed by memorandum opinion, 226 N.Y. 580.[18] The Commission, for its part, has for at least

[18] In the *Iroquois Natural Gas* case, which involved precisely this problem, the New York court stated (171 N.Y.S. at 381):

> * * * under the statutes as they now stand it is the right of the gas company to increase its rates and make the increase effective 30 days after filing with the Commission its schedule of new rates. If complaint is filed with the Commission against the proposed increase, and if the Commission itself sees fit to act without complaint, then a proceeding may be started before the Public Service Commission which will result in an investigation of the propriety of the proposed increase; the Gas Company having notice and the right to be heard, and when a decision is reached, if the new rate is found excessive, it will be annulled or modified according to the decision of the Commission, but this decision may not take place until some time after the new rates have gone into effect. This is the method, and the only method, provided by statute for protecting consumers and municipalities against increases in rates by gas companies. It may be that there is a defect in the statute, and that the Public Service Commission should have power to suspend or postpone the taking effect of proposed rate increases upon complaint made, or even upon its own motion, until a proper investigation can be had. If there is such a defect, it must be cured, if at all, by the Legislature. We must take the statutes as we find them.

the past several years urged Congress to delete the prohibition against suspension of rates for sales for industrial resales. See *e.g.*, Annual Reports of the Federal Power Commission for 1951, 1952, and 1953, at pp. 144, 152 and 154, respectively.

4. The issue decided by the court below is one of importance in the administration of the Natural Gas Act and, in addition, of the Federal Power Act.[19] As shown above, the holding, if permitted to stand, will jeopardize the filed rate procedure enacted in both the Natural Gas Act and the Federal Power Act and consistently administered by the Commission over a period of many years. The regulation in the public interest of rates for natural gas and electricity would be retarded, for the court below would require that all rate increase proposals which involve existing contracts would be subservient to the actions of the parties to the contract.

Indeed, the Third Circuit's opinion may very well require the Commission to enter upon a hearing as to the reasonableness of the existing contract rate, service agreement, or contract affecting a rate, before accepting any rate increase for filing. Prior to the ruling below, it was the Commission's practice, consistent with its reading of the Gas and Power Acts, to hold hearings only when its prelimi-

[19] Sections 205 and 206 of the Power Act (16 U.S.C. 824d, 824e) are substantially the same as Sections 4 and 5 of the Gas Act except that the Power Act does not preclude suspension of rates for sales for industrial resale. A related issue under the Power Act is now pending before the Court of Appeals for the District of Columbia Circuit. *Sierra Pacific Power Co. v. Federal Power Commission*, C.A. D.C. No. 12430 (argued January 12, 1955).

nary study of the proposed increase indicated that need; even with the number of hearings so limited, the heavy volume of rate increase proposals resulted in a substantial delay between the filing and the Commission's final disposition of the requested increase. The many additional hearings probably required by the holding below would further increase the administrative load of the already overburdened Commission [20] and result in even more delay in Commission action on rate increases needed by the gas companies to offset constantly rising costs. The Commission would be compelled to enter upon such additional hearings, although this practice could be without warrant in the Natural Gas Act and its legislative history, as well as contrary to long continued administration of the Act and entirely at odds with established rate regulatory practice.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

JANUARY, 1955.

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[20] The Commission's already heavy administrative burden has recently been further ~~argumented~~ augmented as a result of this Court's decision in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U.S. 672.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS PIPE LINE COMPANY, INTERVENOR

On Petition to Review an Order of the Federal Power Commission

Argued May 19, 1954

Before McLaughlin, Staley and Hastie, Circuit Judges

OPINION OF THE COURT—Filed September 7, 1954

By McLAUGHLIN, *Circuit Judge:*

In this proceeding to review an order of the Federal Power Commission the basic question is whether the Commission is correct in holding that under the Natural Gas Act [1] a natural gas company can in effect wipe out a filed rate contract simply by filing an increased rate schedule. Substantially that is what the Commission considers to have happened to petitioner's contract with intervenor.

Mobile Gas Service Corporation, the petitioner,

[1] 52 Stat. 821-833; 15 U.S.C., Section 717-717w (1952).

is an Alabama distributor of natural gas. It receives its entire supply of that fuel from the intervenor, United Gas Pipe Line Company, a Delaware corporation.[2] By a 1936 contract between it and United's predecessor and an agreement entered into in 1941 with United itself certain of Mobile's gas for resale industrially was to be supplied by United for 90% of Mobile's gross resale revenues, the contract provided that the gas was not to be resold industrially for less than 16¢ per MCF (1,000 cubic feet) without United's consent. This agreement as amended by the 1941 contract was to continue in effect until 1962. Both contracts were filed with the Commission and became United's Gas Rate Schedule #20 and Supplement to that Schedule #7.

In 1946 United agreed with Mobile to a proposed arrangement between Mobile and Ideal Cement Company whereby the latter could be supplied with its industrial gas needs by Mobile for 12¢ per MCF for a period of ten years provided total deliveries remained between 100,001 and 400,000 MCF per month. In accordance with this, United consented to accept the percentage rate of Mobile's sales to Ideal though this would be less than the minimum of 16¢ per MCF. United also agreed at that time to reduce the price of industrial gas to Mobile from 90% of the latter's gross resale revenues to 80%

[2] Jurisdiction is obtained by reason of Section 19(b) of the Natural Gas Act. 52 Stat. 831; 15 U.S.C. Section 717r(b) (1952).

up to 41,667 MCF per billing month and 90¢ in excess thereof. Those agreements were filed with the Commission as Supplements #9 and #10 to United's Rate Schedule #20. Mobile then consummated its proposed contract with Ideal Cement Company to supply gas to the latter for ten years at 12¢ per MCF. The Alabama Public Service Commission approved that contract. Not only United but the Commission recognized the contract as late as July, 1952 when the Commission allowed United to substitute in its filed tariff a flat rate of 10.7¢ per MCF in place of the percentage rate Mobile had been paying. As United advised Mobile, this substitution was made under the Commission directive to convert from percentage to fixed sum and was almost identical with the amount the Mobile percentage rate actually figured.*

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*In Tyler Gas Service Co. v. United Gas Pipe Line Co., D.C. Tex., Dec. 23, 1953, unreported, (on appeal, 5th Cir.), United had agreed to just such an arrangement as Mobile made with Ideal—that is the furnishing of natural gas at a reduced rate. There the period was sixteen years.

In that suit there was a denial of an application for an injunction to prevent United from moving before the Commission for permission to collect its new rate for domestic use gas until the reasonableness of that rate had been finally determined by the Commission. There was a contract involved but it had already been modified in what seems to have been an adversary proceeding. According to the opinion of the district judge the "* * * plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates. * * *". The all important question before us of whether there should be a hearing on the reasonableness of an existent unchanged approved contract prior to the acceptance for consideration of the new

On June 24, 1953, United filed with the Commission proposed increased rates, including a rate of 14.5c per MCF for industrial use gas for Mobile. On July 10, 1953, the Commission ordered a hearing on the lawfulness of those rates, suspended them pending the hearing with the exception of the new Mobile rate, and ordered that hearing to be consolidated with an earlier proceeding investigating all of United's rates. The new rate for Mobile being for industrial use was not subject to suspension under Section 4(e) of the Act. As a result it became operative July 25, 1953. Mobile, on July 16, 1953, attempted to intervene in the consolidated proceeding. On August 4, 1953, it filed a petition with the Commission setting up the above situation and asking the Commission to amend its order of July 10 so that United's new filing in so far as it affected the Ideal contract would be rejected and the 14.5c rate would not be permitted to take effect. In the alternative it requested a hearing on the lawfulness of the filing of that rate and asked that if Mobile was obligated to pay United the increased rate, United be directed to hold those payments subject to refund to Mobile in the event the

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rate and prior to the determination of the reasonableness of that new rate was not before the court.

It should be emphasized also that the fact that Tyler concerned a rate for sale of gas for domestic use of itself sets this action apart from the issue of this appeal. In Tyler under Section 4(e) the Commission could and did suspend the effective dates of the increased rates for five months after which period it could order any subsequent collections to be held subject to refund in the event the new rates were ultimately found to be unlawful.

new rate was ultimately determined to be unlawful. At that stage no action had been taken on Mobile's application to intervene and the new rate had been governing since July 25th. As a consequence Mobile amended its petition and urged the Commission that it be made a separate cause. That prayer was granted as was United's later petition to intervene in the new proceeding. On December 7, 1953, the Commission on the pleadings denied the prayers of Mobile's petition and dismissed it. On February 4, 1954, the Commission refused rehearing to Mobile. This petition for review of the Commission's decision followed.

Mobile's main point is that its United contract with respect to Ideal is a valid agreement which cannot be set aside by United's unilateral action of filing an increased rate schedule. It frankly recognizes the Commission's paramount authority and concedes that if after a proper proceeding the Commission found the contract rate to be against the public interest it could modify it or set it aside entirely.

The Commission contends that where a natural gas company files a rate schedule under 4(d) of the Act that rate is to be charged unless suspended initially or disapproved finally by the Commission after investigation and hearing; rates for industrial use not being subject to suspension when filed become effective thirty days thereafter until finally passed upon by the Commission. The latter insists that even where as here the rate conflicts with an admittedly preexisting filed contract the distribu-

tor is given no chance to defend its contract, on which it has made approved commitments, before that contract is to all practical purposes abrogated.

It is undisputed that under the ordinary 4(e) proceeding which the Commission has instituted with reference to the new rate schedule involved the dispositive question before the Commission is whether the increased rates are just and reasonable. 4(e) makes this plain when it says:

> "* * * At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

In other words if in the pending hearing United can show that its new filed rate for Mobile is reasonable that ends the matter and the new rate stands. No consideration will be given to the accepted contract, the circumstances under which it was entered into, the long-term commitments sanctioned by the Commission and whether the rate fixed by it is unreasonable and against the public interest under the facts. What petitioner is endeavoring to do is have its contract passed upon in the first instance prior to authorization for filing of United's new rate and the consideration of whether that rate is currently reasonable.

The Commission maintains that 4(d) of the Act[4] upholds its stand. That section provides, as far as we are primarily concerned, that "no change shall be made by any natural-gas company in any such rate * * * or *contract* relating thereto, except after thirty days' notice to the Commission and to the public." (Emphasis supplied.) This means, according to the Commission, that since under 4(e) it does not have the power to suspend an industrial use gas rate, United can fundamentally cancel the Mobile contract despite the fact that as of now Mobile is bound for its duration to Ideal, subject only to the Commission later passing finally upon the rate. And in the Commission thought this can take place without any statutory notice to Mobile or an opportunity for Mobile to be heard regarding its contract rate. The practical result of this is that Mobile, in living up to its contract with Ideal, is supplying natural gas to that company for

[4] Section 4(d) of the Act reads as follows:

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

12c per MCF and may well be forced to continue to do so until the expiration of its contract in 1956. Meanwhile Mobile must pay United 14.5c per MCF for the same gas it delivers to Ideal though its contract with United has never been questioned by the Federal Power Commission or in any way construed to be against the public interest.

The Commission and intervenor rely to a large extent upon Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372 (1919), and Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109 (1937). The first case is quoted by the Commission as holding at page 375: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." The principle stated is of course sound law and is expressly uncontroverted by petitioner. In the Union litigation there had been a hearing before the Georgia Commission on the question of the reasonableness of the contract rates. The Commission found that they were unlawfully discriminatory. Here, as we have seen, Mobile had no opportunity to defend the contract rate prior to the new rate coming into being.

Midland does lend some support to the position of the Commission and the intervenor. But there the rates filed by the utility were not opposed and were permitted by the Missouri Utility Commission without hearing.[5] Far more important than

[5] A very real distinction exists between the position of the realty company in Midland and that of the present petitioner.

that the decision is based upon a state court interpretation of a state statute. The question litigated and passed upon was whether a Missouri statute, as construed by the Missouri Supreme Court violated the federal constitution. That sort of problem is not presented in this action.

Another case involving a state court explanation of a state law is Wichita R.R. v. Public Utility Commission, 260 U.S. 48 (1922).[6] That came into the federal courts through diversity of citizenship and as far as it goes affords strong help to petitioner. In it the Kansas Commission without any finding of unreasonableness and despite a duly filed contract for the sale of electric power, authorized a surcharge. The railroad had appeared in the Commission proceeding and had objected. The matter was removed to the United States District Court which restrained execution of the Commission's order.[7] The Eighth Circuit reversed.[8] The Supreme Court upheld the district court, quoting with approval from the opinion of the Kansas Su-

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Hearings were held on similar contracts and the latter found unreasonable prior to the utility company's suit against Midland being disposed of and Midland had not appeared in those hearings. In other words Midland made no attempt to attack the new rate directly before the Commission but contented itself with raising a defense in a collateral proceeding brought by the utility company.

[6] See also Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., 295 Fed. 895 (R.I. 1924) construing a similar Rhode Island statute.

[7] Wichita's motion for judgment on the pleadings was granted. There was no reported opinion.

[8] 268 Fed. 37 (8th Cir. 1920).

preme Court in Kaul v. American Independent Telephone Co., 95 Kan. 1, 147 Pac. 1130 (1915) where it is stated that:

> "* * * The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The Kansas procedure as to rates bears great similarity to the Natural Gas Act formula. Under Section 20 of that state's public utility statute[9] a public utility may file higher rates. Section 13 of the law empowers the Commission to set aside rates which after hearing have been found to be unreasonable. It is under the parallel provision in the Natural Gas Act, (Section 5(a)) that petitioner contends the Commission should have functioned in passing upon United's attempt to obtain a higher rate for its gas sold to Mobile for the industrial user Ideal. Section 5(a) reads:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or

[9] Public Utility Law of Kansas, Session Laws of 1911, c. 238.

gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Section 5(a) was before the Tenth Circuit in Colorado Interstate Gas Co. v. Federal Power Commission, 142 F. 2d 943, 954 (1944), affd. 324 U.S. 581 (1945). In that case on complaint of the City and County of Denver and the State of Wyoming the Commission held that existing rates and contracts were unreasonable. The gas companies claimed

that the finding was not founded on substantial evidence.

The Court said:

> "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness. Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 43 S. Ct. 51, 67 L. Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F. 2d 881. And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431."

The Commission suggests that the Colorado decision is not applicable because the proceedings were under Section 5 but we fail to note any contradiction of the court's statement that filed contract rates and charges can only be set aside on an express finding of unreasonableness which in turn specifically follows the very opinion (Wichita) that the

Commission asserts turns on a peculiar Kansas law. Actually the Commission time and again insists that it does not claim that the Congress in the Natural Gas Act intended to set aside contracts completely. It states flatly that the Act shows no such thought. Nevertheless on the theory of "scheme of regulation" it argues that it be permitted to construe Section 4(d) so that in reality that consequence is obtained. In F.P.C. v. Niagara Mohawk Power Corp., 347 U.S. 239, the Supreme Court made it abundantly clear that such authority "requires clear authorization", which is absent from the Natural Gas Act. In the Niagara Mohawk litigation the query was whether the Federal Water Power Act of 1920 had abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. The Supreme Court interpreting that statute said at p. 251:

> "* * * We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. * * * On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties."

So here, the Natural Gas Act does not expressly permit existing contract rights to be abolished by

a mere unilateral filing of new rates. The plan of the Natural Gas Act is likewise one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable.

Beyond question the Commission's action in this instance would result in further impairment of petitioner's common law rights. As the Supreme Court stated in Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907), a case cited by intervenor but interpreting the Interstate Commerce Act:

> "* * * a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

See Shaw v. Railroad Co., 101 U.S. 557, 565 (1879); American District Telegraph Co. v. Kittleson, 179 F. 2d 946, 953 (8th Cir. 1950); 3 Sutherland, Statutes and Statutory Construction (3rd ed. 1943) 164-182.

Nor is a rate contract automatically nullified merely because the return is low. In this instance there seems no doubt but that the Ideal Cement account represented important new business to

Mobile and to United and that the long range price concession was made in order to obtain it. Cf. Arkansas Natural Gas Co. v. Railroad Commission, 261 U. S. 379 (1923); Railroad & Light Co. v. Court of Industrial Relations, 134 Kan. 217, 214 Pac. 797 (1923). And the fact that the Commission can change the contract does not render it void for lack of mutuality. Southern Utilities v. Palatka, 268 U. S. 232 (1925); Hoiked Dry Goods Co. v. Wichison Industrial Gas Co., 64 F. 2d 881 (10th Cir. 1933).

With reference to the pertinent legislative history regarding such contract as before us, all three of the parties quote the colloquy between Congressman Halleck and Mr. Booth, appearing for the Illinois Public Service Commission on the bill which immediately preceded the Natural Gas Act. The accurate report of this reads:

> "Mr. Halleck. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract *could* be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?
>
> "Mr. Booth. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return upon the fair value of its property."

(Emphasis supplied).

Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 4008, at page 43.

The reasonable inference from the above is identical with petitioner's theory, namely, that the Commission has the power to eliminate a private contract; not that the latter is automatically destroyed by the unilateral action of a party thereto.[16]

There is no mention in the debates of Congress that the Act was ever intended to permit a contracting party to eliminate its existing contracts simply by giving thirty days' notice to the public and to the Commission. Instead the Act was stated to contain the "usual provisions * * * such as we find in

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[16] The intervenor cites Armour Packing Co. v. United States, 209 U.S. 56 (1908), for the point that Congress intended the scheme of the Act to replace every other device, including contract provisions. That case was under the Elkins Act amendment to the Interstate Commerce Act. As the opinion itself states that amendment was adopted to make certain that all shippers be given the same treatment with one rate for a similar carriage of freight. The court also made clear that the Interstate Commerce Act contained no provision for the filing of contracts with shippers. The lack of recognition of that type of agreement in the Interstate Commerce Act was for the consideration of Congress stated the Court. Commenting on the omission of the Interstate Commerce Act to provide for private contracts the Court said at page 82: "It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done." As we have seen this possible course outlined by the Supreme Court in Armour has been followed in the later Natural Gas Act.

all regulatory measures enacted by Congress",[11] and according to the Committee report, there was "nothing novel in its provisions."[12] It should also be noted that there was virtually no opposition to the bill from any source.[13]

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[11] 81 Cong. Rec. 6722 (1937):

"Mr. Lea: * * *

"There are the usual provisions. Without attempting to go into detail, what I call usual provisions are those such as we find in all regulatory measures enacted by the Congress. This bill contains, for instance, administrative provisions; for rules affecting just and reasonable rates; for the power of the Commission to fix maximum or minimum rates or a specific rate after hearing; for the rule against discriminations and preferences as between consumers or localities; for the requirement that the schedules be kept open for public inspection; for the power of the Commission to suspend the rates where deemed unduly high. The bill covers the question of accounting; following standard lines; of giving the Commission the power to control the accounts, including the depreciation account; and of requiring the gas companies under the regulation of this bill to conform to those accounting practices.

* * *

"The bill makes provision for complaints and provides for hearings and has the usual provisions in reference to the production of testimony and rehearings by the Commission on petition, court review of the orders of the Commission, and, a rule, that the findings of the Commission, if supported by substantial testimony, are conclusive upon courts in connection with questions that may be taken to courts.

"Those are what might be called the principal provisions of the bill."

[12] H. Rep. No. 709, 75th Cong., 1st Sess., p. 3. See Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581, 601 (1945).

[13] 81 Cong. Rec. 6725 (1937):

"Mr. Mapes: Mr. Chairman, as far as I know, there is no opposition to this bill. I do not know of any member

The Commission itself in its brief says:

> "The reports of the Federal Trade Commission on the natural-gas industry abound with references and data concerning the contracts of gas companies most of them for long terms. It was at the time of the passage of the Act, and is now, a common and usual practice for such gas companies to contract for all sales or transportation of natural gas. Those companies which sold otherwise were exceptions."

This being so one would think that there would be at least some debate on a provision which provided for the lawful unilateral cancellation of that type of agreement if Congress had that in mind.[14]

The Commission also makes much of the provision in Section 4(e) which prohibits the Commission from suspending rates for the sale of natural gas for resale for industrial use. The purpose of this provision, however, as stated by the Congress-

of the House or anyone else who opposes it. It is supported by the public utility commissions of the States and by all public bodies, as far as I know, who have anything to do with or have given any particular attention to the question of the distribution and sale of natural gas to the consuming public. As a matter of fact, my attention has not been called to any opposition to it, even on the part of the gas companies themselves."

[14] The Commission points to certain evidence of the Commission's solicitor on a predecessor bill as demonstrating the intent to make filing procedure controlling irrespective of the contractual situation. There is nothing in that testimony from which it can be fairly concluded that the kind of contract before us was within the contemplation of the witness or his examiners.

man who introduced the amendment, was "to prevent suspension in cases of industrial use *where there are short term contracts* * * *."[15] (Emphasis supplied). The clear implication is that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates. The implication is equally clear that Congress did not visualize the present circumstances, where one of the contracting parties is attempting under the cover of the Act to avoid its contractual duties.

The Commission's order under review refers to Part 154 of the Commission's Regulations under the Act. Those Regulations give no assistance to the Commission's interpretation of Section 4. The very section of the Regulations under which United filed its conversion schedules[16] in May, 1952, reads as follows:

> "Section 154.85 *Status of contracts filed as rate schedules and restated.* Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and gen-

[15] 81 Cong. Rec. 6727 (1937).

[16] There is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate. The latter as has been mentioned was substantially the same as the old percentage rate and inferentially became a part of the unchanged contract.

eral terms and conditions of the tariff, *until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: Provided, however*, That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff which are to remain in effect: *Provided, further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.*" (Emphasis supplied in part).

United's filing on June 24, 1953, did attempt "to effect a change" in an unexpired contract without "the execution of a form of service agreement contained in the tariff." This case is therefore distinguishable from Mississippi River Fuel Corp. v. Federal Power Com'n, 202 F. 2d 899 (3rd Cir. 1953), where we held that all the filing requirements had been complied with and where there was apparently no existing filed contract. Moreover, we assumed for the purposes of that case "that the Commission has the power, implied from its authority to make rules and regulations, to reject a proposed filing which does not conform to such rules and regulations." Mississippi River Fuel Corp. v. Federal

Power Com'n, supra at 901. See 18 CFR Section 154.24.[17]

In view of the above language in the Commission's own Regulations and of the complete absence of suggestion in the statute or in the legislative history that the Act was intended to authorize the abrogation of existing contract rights by means of the unilateral substituted rate procedure, we hold that the Commission erred in not rejecting United's Revised Sheets Nos. 39 and 40 in so far as they effected the Ideal contract. To do otherwise would be an attempt by us to legislate judicially since the construction of 4(d), as contended for by the Commission and the intervener is not warranted by the statutory language. F. P. C. v. Niagara Mohawk Power Corp., supra. Any changes in 4(d), particularly of the radical nature urged, would be for the consideration of the Congress, not for this Court.

With this holding it becomes unnecessary for us to consider Mobile's alternative contention that even if the revised schedule be accepted for filing a subsequent separate hearing be held on the lawfulness of the filing at which time the reasonableness of the prior contract rate would be passed upon. Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies collected after the acceptance of such filing be held subject to refund. Since we

[17] "Section 154.24 *Rejection of material submitted for filing.* The Commission reserves the right to reject any material submitted for filing which fails to comply with the requirements set forth in this part. [Section 154]."

are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile. B. & O. R. Co. v. United States, 279 U. S. 781 (1929); Restatement, Restitution, Section 74 (1937); cf. Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134, (1919).

Those parts of the Commission's order which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, will be reversed.

HASTIE, *Circuit Judge*, dissenting.

The Commission's order of July 10, 1953 was lawful and proper under the terms and scheme of the Natural Gas Act. This court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

Present: McLAUGHLIN, STALEY and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that those parts of the order of the Federal Power Commission which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953 which paragraph permitted the revised schedule to take effect, be, and the same are hereby reversed.

Attest:

IDA O. CRESKOFF,
Clerk.

September 7, 1954.

APPENDIX B

Sections 4 and 5 of the Natural Gas Act, 52 Stat. 824, 15 U. S. C. 717, *et seq.* read in pertinent part as follows:

* * * * *

4(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time

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when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed, the Commission shall have authority, either upon complaint of any State, municipality, or State Commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate,

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charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, af-

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ter a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 31

FEDERAL POWER COMMISSION, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION [1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 139–155) is reported at 215 F. 2d 883. The opinion and order of the Federal Power Commission which was reversed by the Court of Appeals is set out at R. 1–6.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1954 (R. 155). By order

[1] This is a companion case to *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation and Federal Power Commission*, No. 17, this Term, also pending before this Court on writ of certiorari. The question here is related to that presented in *Federal Power Commission* v. *Sierra Pacific Power Company*, No. 51, this Term, and its companion case, *Pacific Gas and Electric Company* v. *Sierra Pacific Power Company*, No. 53, this Term.

of Mr. Justice Burton dated November 29, 1954, the time for filing a petition for a writ of certiorari was extended to and including February 4, 1955 (R. 157). The petition for a writ of certiorari was filed on January 20, 1955 and granted on February 28, 1955 (R. 158), 348 U. S. 950. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTION PRESENTED

Whether under the Natural Gas Act the Federal Power Commission may accept for filing and permit to become effective a schedule submitted by a natural gas company increasing its rate for the sale of natural gas for resale to an industrial user, pending a hearing as to its reasonableness, where the existing rate is embodied in a contract between the gas company and its purchaser, filed with the Commission as a rate schedule, and the purchaser has not agreed to the increase.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, *et seq.*, are set out in the Appendix, *infra*, pp. 101–104.

STATEMENT

Respondent, Mobile Gas Service Corporation, is an Alabama utility which distributes and sells natural gas locally to domestic and industrial users (R. 8). It purchases its entire supply of

natural gas under contract with United Gas Pipe Line Company, a natural gas company under the Natural Gas Act.

In January 1936, Mobile contracted with the predecessor of United for the purchase of its requirements of gas for resale in the city of Mobile and nearby areas (R. 9, 24, 81–86). Upon the enactment of the Natural Gas Act, the contract was filed with the Commission as Rate Schedule No. 20 (R. 9). The contract was amended in 1941 to provide that gas for industrial resales was to be supplied by United to Mobile at a rate of 80–90% of the proceeds received by Mobile, but not less than 16¢ per Mcf unless United consented in writing (R. 9, 87). This amendment was filed with the Commission as Supplement No. 7 to Rate Schedule No. 20 (R. 55–56).

In 1946, United agreed with Mobile to reduce its price on the gas which Mobile proposed to resell to Ideal Cement Company for industrial use to a fixed percentage of the proceeds, although this would result in United's receiving less than 16¢ per Mcf (R. 2, 10, 90–95). An amendment embodying this contract was filed with the Commission as Supplement No. 10 to Supplement No. 7 (R. 56–57).[2] At the same time Mobile con-

[2] Another amendment, not material to this case, was made by contract in 1946 and was filed with the Commission as Supplement No. 9 to Rate Schedule No. 20 (R. 57–58). It

tracted to supply gas to Ideal for a ten-year period (R. 3, 9–10) at a price which, while it varied with the amount of total deliveries, resulted in an average charge by Mobile of 12¢ per Mcf (R. 10, 12, 91, 140).

Subsequently, in May 1952, United filed its Gas Tariff Original Volumes No. 1 and No. 2 to comply with the Commission's requirement that all rates be restated in tariff form and in dollars and cents (R. 24). See 18 C. F. R. 154.81–86; 154.38 (d). While United proposed by these filings to increase other contract rates substantially (R. 60–62),[3] the rates to Mobile were not affected, with the tariff merely substituting for the contract's percentage rate an equivalent rate of 10.7¢ per Mcf (R. 3, 10–11, 58–59).

On June 24, 1953, United filed the rate schedules here involved with the Commission whereby it proposed to increase the rates for a number of its sales to various customers, including Mobile (R. 1, 11, 66–67). The increase in the rate to Mobile for the gas resold to Ideal was from 10.7¢ to 14.5¢ per Mcf (R. 1, 11, 25). United also sought a waiver of the thirty-day notice period

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modified the general provisions governing rates for industrial resale in some respects but continued to provide a rate fixed at a percentage of Mobile's proceeds, with a minimum rate of 16¢ per Mcf unless United consented in writing (R. 88–90).

[3] Acting under Sections 4 (d) and 4 (e) of the Natural Gas Act, *infra*, pp. 101–103, the Commission, upon receiving objections to these increases, suspended the proposed increases pending a hearing on their reasonableness (R. 60–64).

provided in Section 4 (d) of the Gas Act, *infra*, pp. 101–102, and requested that the effective date of the new schedules be July 15, 1953 (R. 1, 67).

By order dated July 10, 1953, the Commission refused to accede to United's request that the thirty day notice period be waived (R. 1, 66–70). Instead, noting that United's increased rates "have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful" (R. 67), the Commission entered upon a hearing into the reasonableness of the proposed increases under Section 4 (e) of the Act, *infra*, pp. 102–103; it consolidated United's new application with other proceedings then pending and involving United's rates and fixed July 20, 1953, as the date for hearing on the lawfulness of the proposed rates (R. 69). In addition, pending the outcome of the hearing, the Commission, acting under the provisions of Section 4 (e), suspended for five months from the time the rates otherwise would be effective, (*i. e.*, until December 25, 1953) all of the proposed increases, which it was authorized to suspend under that Section, including those to Mobile (R. 69).[4] But since Section 4 (e) expressly prohibits suspension of rates for sales for industrial resale, the Commission ordered that the proposed rate schedules for sales for industrial resale, including the Mobile-Ideal sale,

[4] At the expiration of the suspension period, all the suspended rates were ordered in effect subject to refund, as authorized by Section 4 (e) (R. 106).

"be and the same are hereby permitted to become effective on July 25, 1953," the last day of the thirty-day notice period provided in Section 4 (d) (R. 69).

Mobile first filed a petition for intervention in the consolidated proceedings on July 16, 1953 (R. 70–72), and on August 4, 1953, a petition therein for modification of the Commission's order (R. 19). However, on August 7, 1953, Mobile amended its petition for modification and invoked a separate proceeding in which it sought to attack the July 10, 1953, order (R. 19–20). The amended petition (R. 7–18) requested the Commission: (1) to amend its order of July 10, 1953, so as to reject the filing of the new schedules for the Mobile-Ideal sales on the ground that the rates fixed in the United-Mobile contract could not be changed by United's "unilateral action" in filing schedules without "a hearing and a determination [by the Commission] that the said existing contract * * * is unjust and unreasonable" (R. 12); (2) if rejection were denied, to order a separate hearing on the lawfulness of the higher rates filed by United for the Mobile-Ideal sales (R. 13); (3) to amend the paragraph of the order which permitted the Mobile-Ideal rates to become effective in order to make it clear that the Commission does not approve such rates (R. 13–16); and (4) to direct United to refund to Mobile the difference, if any, between

the rates proposed by United and those finally determined by the Commission (R. 16–17).

On December 7, 1953, the Commission dismissed Mobile's petition and terminated the separate proceeding (R. 1–6). The Commission held, first, that United's filings could not be rejected because they were made in conformity with the Commission's regulations and Section 4 of the Natural Gas Act, the only section under which a natural gas company could initiate a rate increase (R. 3). It then ruled that no good reason was shown for a separate hearing; the consolidated hearings, which had already begun, were more practical since the reasonableness of the rate for the Mobile-Ideal sale raised issues common to the other rates involved in the consolidated hearings (R. 3–4). In addition, the Commission noted that it was unnecessary to amend the order permitting the rates for the Mobile-Ideal sales to become effective since the Commission thereby merely refused to waive the thirty-day notice period and it was clear that no approval was implied (R. 4–5). Finally, the Commission held that it had no power to order refunds in the case of sales for resale for industrial use, since the rates for such sales are not suspendible under Section 4 (e) and its refund authority is restricted to suspendible rates (R. 5).[5]

[5] After the decision below, United and Mobile proposed an alteration in their arrangement as to industrial resales, under which United would sell gas directly to these industrial

Upon denial of its petition for rehearing, (R. 38–45, 46–47), Mobile sought review in the Court of Appeals for the Third Circuit (R. 47–55, 95–103). The court below (per McLaughlin, J.), reversed the Commission's order and directed it to reject the filing by United of proposed increases covering its sales to Mobile for resale to Ideal. It held that since those rates had been established by contract, they could be altered only pursuant to a determination by the Commission, made after hearing, that the existing rates were unjust and unreasonable (R. 139–155).[6] Judge Hastie dissented (R. 155).

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customers, including Ideal, as an assignee of Mobile's contracts, and Mobile would receive 2¢ per Mcf for transporting the gas. While the Commission approved the new arrangement on April 15, 1955, this approval is prospective only, with the question presented in this case still outstanding as to the proper rate from July 25, 1953 (when the increased rate of 14.5 cents per Mcf filed by United went into effect) until after April 15, 1955 (when the above new arrangement was consummated). United's right to retain the 3.8 cents per Mcf increase (aggregating approximately $240,000 for the period involved) depends on whether the Commission properly permitted the increased rate to become effective July 25, 1953. If not, Mobile would be entitled, as the court below ruled, to the return of the increased amount. Thus, the disposition of the increase already paid awaits the determination of the present case.

[6] In view of this holding, the court did not reach a further question raised by Mobile—whether, assuming the proposed Mobile-Ideal increase could become effective prior to a determination as to its reasonableness, the Natural Gas Act authorized the Commission to order refunds should the new rate for the industrial resales be later found to be unreason-

SUMMARY OF ARGUMENT

I

A. The clear language of the Natural Gas Act belies the conclusion below that since Mobile's rate had been established by contract with United it could be altered only pursuant to a Commission determination, after hearing, that the existing contract rate was unreasonable. On its face, the Gas Act sets out two separate and distinct procedures for making changes in rates, (1) the filed rate procedure of Sections 4 (d) and (e) (followed in this case) and (2) the hearing and order procedure of Section 5 (a) (the procedure which would have to be followed under the decision below). And the statutory language leaves no doubt that the Section 5 (a) procedure is available only when initiated by the Commission on its own motion or by someone other than the selling gas company; the latter may initiate rate changes only under the filed rate procedure. Each procedure thus complements the other with no overlap. Consequently, when a gas company files new schedules, the Commission has no choice but to follow the filed rate procedure of Sections 4 (d) and 4 (e); it may enter into a hearing as to the reasonableness of the proposed rates and suspend them for five months pending the hear-

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able (R. 154–155). Consequently, the question as to refund is not involved in the present posture of the case.

ing, except for rates for gas for industrial resale which may not be suspended. That is what the Commission did in this case, and it exercised the full discretion it had in favor of Mobile. The rate for the gas sold to Mobile for resale to Ideal went into effect thirty days after it was filed by United solely because the Act prohibited its suspension.

The existence of a contract rate plays no part in fixing the procedure to be followed in processing a rate change. Not only is it the almost universal practice in regulating utilities to treat contract rates in the same manner as other rates, but the Natural Gas Act specifically precludes any such distinction. The filed rate procedure and the Section 5 (a) procedure both refer in parallel terms to, and are applicable to, changes in "any rate * * * or * * * contract," thereby demonstrating that the source of the existing rate is immaterial to the determination of the applicable procedure. Nor is there any support for Mobile's reading of "contract" in Section 4 (d) as meaning that the purchaser must agree to the changes before that Section is applicable. Section 4 (d) deals with *changes "made* by any natural gas company" [emphasis added], and requires the filing of new "schedules", not "contracts"—requirements which negate the necessity of the purchaser's assent. Moreover, Mobile's reading would be equally applicable to "contract" in Sec-

tion 5 (a), and, if accepted, would result in complete frustration of Commission regulation.

Contrary to Mobile's contention, our construction of the Natural Gas Act does not "automatically abrogate" contracts. Rather, such contracts continue to be valid and enforceable as utility contracts, subject to modification in accordance with the prescribed procedures—either under Sections 4 (d) and 4 (e) or Section 5, depending on who is seeking the rate change.

B. The Commission has consistently followed the filed rate procedure in circumstances such as are here involved; without regard to whether the existing rate is embodied in a contract. The Commission's regulations, in setting forth requirements for filing by a gas company of rates and of rate changes, make no distinction between contract-embodied rates and others.

II

A. The meagerness of legislative discussion on the methods of changing rates in the Gas Act suggests that Congress intended these provisions to be read in accord with their ordinary meaning, as the Commission has done. This is buttressed by the few legislative references to Section 4; in each instance, the filed rate procedure was treated as having general applicability to all existing rates. Furthermore, during its course through the Congress, the Act was said to contain

"the usual provisions" of federal regulatory measure, with "nothing novel in its provisions."

B. That the Commission's reading is neither novel nor unusual is shown by a comparison with the Interstate Commerce Act. The methods for changing rates in the Gas Act and the Power Act are set forth in substantially the same form and were taken bodily from the Commerce Act, with a few pertinent changes. The Commerce Act contains a filed rate procedure, corresponding to Sections 4 (d) and 4 (e) of the Gas Act, as well as a complaint, hearing and order procedure, corresponding to Section 5 (a). The impact of a change in rate filed by the carrier upon a contract-fixed rate—the precise issue in this case—was considered by this Court under the Commerce Act in *Armour Packing Co.* v. *United States*, 209 U. S. 56. The square holding in *Armour* that the filed rate superseded (without a hearing) the contract rate is highly persuasive here, since the provisions of the Commerce Act were adopted in the Gas Act.

While the Gas and Power Acts, unlike the Commerce Act, provide for filing of contracts, Congress did not thereby intend to depart from *Armour* and make contract rates immune from change under the filed rate procedure. For, in addition to requiring the filing of contracts, Congress added appropriate language to Sections 4 (d) and 4 (e), as well as to Section 5 (a) (and the corresponding sections of the Power Act), to make

each of the two rate procedures expressly applicable to changes in contract rates.

C. 1. Likewise, the overwhelming majority of state regulatory schemes provide a filed rate procedure comparable to the Gas and Power Acts. Under these statutes, this Court, and the state courts with but little dissent, have held that the filed rate procedure may be invoked by a utility to effectuate a change in a rate fixed by contract. In each of a number of cases arising under these statutes, the courts rejected contentions of the purchasers, similar to Mobile's here, that because the existing rate was embodied in a contract, increases could not be made under the filed rate procedure. See, *e. g., Suburban Water Co. v. Oakmont Borough,* 268 Pa. 243, 248–250; *Public Service Commission* v. *Pavilion Natural Gas Co.,* 232 N. Y. 146, 150–151; *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.,* 147 Ark. 502, 506–507.

Two of these state cases came before this Court. In both, the Court recognized the propriety of using such filed rate procedures to change contract rates. *Midland Realty Co.* v. *Kansas City Power & Light Co.,* 300 U. S. 109, affirming 338 Mo. 1141; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.,* 245 U. S. 633, affirming 159 Wisc. 130. In *Midland,* this Court, in addition to holding that there was no constitutional objection to the use of a filed rate procedure to supersede contract rates, specifically ruled that under the Missouri statute (similar to the Gas Act) the

rates filed by the utility effectively superseded contract rates.

2. A minority of state legislatures have modified the filed rate procedure, and their statutes require commission approval of changes before they become effective. Only in Connecticut, and to some extent in Washington, did the legislatures make the applicable procedure dependent on whether the existing rates are embodied in private contracts, and exclude such contract rates from the filed rate procedure. Congress, however, chose to incorporate the "usual," "standardized" provisions rather than these deviations followed by a few states, and the filed rate procedure adopted by Congress therefore applies to contract rates.

3. The court below erroneously relied on *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, where this Court, accepting Kansas' interpretation of its statute, invalidated a Kansas commission order authorizing an increase in a contract rate without a finding that the existing rate was unreasonable. Not only is the Kansas statute a minority provision which Congress did not intend to adopt but it differs from the Gas Act in that it does not contain a filed rate procedure comparable to Sections 4 (d) and 4 (e). Changes filed by a utility expressly require the consent of the Kansas commission, and, furthermore, the only Kansas provision for hearing as to rates is one similar to

that in Section 5 (a) of the Gas Act. Under such a provision—differing markedly from that in *Midland* and here—it is understandable why the Kansas court held that a filing, without more, cannot supersede contract rates.

III

A. The court below apparently felt that since Mobile would be caught in a "squeeze" between its contract rate with Ideal and United's proposed increase, it was inequitable to permit United's new rate to be operative during the pendency of the hearing. However, this inequity may be more apparent than real. There is nothing to indicate that Mobile could not obtain relief from its contract with Ideal under the Alabama regulatory statute. Moreover, in the overwhelming majority of states, such relief could be obtained and any Alabama deviation should play no part in construing the Gas Act.

B. Should Mobile suffer a loss on its Ideal resales during the time required for the Commission's hearing and decision, this may be offset by the fact that United's proposed increases on other sales to Mobile were suspended for five months. It is such rough balancing that Congress apparently had in mind in prohibiting the suspension of sales for resale for industrial use. And any losses sustained by Mobile during the period needed to pass upon United's new rate here—or by the gas company in other cases where the rates are suspended—is a necessary

incident of rate regulation. See *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C. A. 4). Even if it be assumed that there has resulted an undue burden on purchasers of natural gas for industrial resale, like Mobile, such a defect must be cured, if at all, by the legislature. There is no basis on which the court can balance the equities by relieving those who have contract rates at the cost of discriminating against others.

IV

In two cases where the issue was raised, the Fifth Circuit and the Third Circuit, the court which rendered the instant decision, recognized that the filed rate procedure was applicable in situations comparable to that here involved. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73, 77–78 (C. A. 5); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, 902 (C. A. 3). In contrast, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (C. A. 10), relied upon by the court below, is irrelevant since it involved an order of the Commission after a hearing on complaint under Section 5 (a). There was no issue as to the filed rate procedure before the Tenth Circuit and that court did not purport to express an opinion on it.

ARGUMENT

When United filed with the Commission new schedules increasing, among others, its rate for gas

supplied to Mobile for industrial resale to Ideal, the Commission followed the filed rate procedure which has long been established and which it believes is mandatory under Sections 4 (d) and 4 (e) of the Gas Act. Since the Commission's preliminary inquiry indicated that the newly filed increases might be unlawful, a hearing was ordered on the reasonableness of the new rates. Pending the outcome of that hearing, the Commission suspended all suspendible rates for the maximum period allowed by the Act and postponed, for as long as possible under the Act, the effective day of United's rates for industrial resale (including the Ideal resale) as to which the Act prohibited suspension.

The court below has held that the Commission erred in following this procedure with regard to the rate for the Mobile-Ideal resale. In the court's view, Sections 4 (d) and 4 (e), which provide the procedure to be followed when a natural gas company seeks to increase its rates, are inapplicable where existing rates were established by contract and the purchaser does not agree to the increase. Reasoning that statutes are not to be read to limit contract rights except where expressly provided, and that "the Natural Gas Act does not expressly permit existing contract rights to be abolished by a mere unilateral filing of new rates" (R. 148), the court held that contract rates are to continue in effect until the Commission determines after a hearing, held under

the provisions of another section, Section 5 (a), that the contract rates are unreasonable (R. 146, 148). Accordingly, the court held, since no such hearing had been had and Mobile had not agreed to the increase, the Commission should have not permitted United's increase for the Mobile-Ideal resale to become effective but should have rejected United's filing.

We believe that the court below departed from the Natural Gas Act when it set aside the procedure followed by the Commission in this case, a procedure employed in all similar cases where a natural gas company has sought to increase its rates. This established Commission practice follows to the letter the plain language of the Act, and, far from being "of a radical nature" (R. 154), accords with long-standing interpretation of similar federal statutes, upon which the Natural Gas Act was patterned, and of analogous state regulatory statutes. Viewed in this light, there is "nothing novel in [the] provisions" (H. Rep. No. 709, 75th Cong., 1st Sess., p. 3) of Sections 4 (d) and 4 (e) as construed by the Commission; instead, as so interpreted, they contain no more than "the usual provisions * * * such as we find in all regulatory measures enacted by Congress" (81 Cong. Rec. 6722). While the result reached below has been expressly incorporated in a few state statutes, Congress has not seen fit to insert into Sections 4 (d) and 4 (e) the exception formulated by the Court of Appeals;

as one district judge has noted, "It is not for this Court to add another proviso, reading 'and where there is no private agreement or contract to the contrary.'" *Tyler Gas Service Co. v. United Gas Pipe Line Co.*, E. D. Texas, Civil No. 1662 (reproduced at R. 73, 79), affirmed, 217 F. 2d 73 (C. A. 5). Congress has provided, and the Commission has applied, a procedure which accords with that of the majority of the states in the comparable phase of state utility regulation. If a change to the minority view is to be made, it should be made by Congress.

I

THE TERMS OF THE NATURAL GAS ACT AND THE CONSISTENT ADMINISTRATIVE PRACTICE REQUIRED THE COMMISSION TO ACCEPT UNITED'S FILING AND TO PERMIT IT TO GO INTO EFFECT EVEN THOUGH THE EXISTING RATE WAS ESTABLISHED BY CONTRACT

A. THE FILED RATE PROCEDURE SET OUT IN SECTIONS 4 (d) AND 4 (e) WAS APPLICABLE ACCORDING TO ITS TERMS

The decision below ignores the critical factors (1) that the Gas Act sets out two separate procedures for making changes in the rates charged by a natural gas company, and (2) that the Act does not allow a free choice of procedures to the Commission, natural gas companies, or third parties, but rather prescribes the conditions for invoking each. Under neither of these procedures is it in any way material that the rate being superseded is embodied in a contract with the

purchaser or that the purchaser has not consented to the change.

1. Sections 4 (d) and 4 (e) (App., *infra*, pp. 101–103) set out the filed rate procedure for effectuating rate changes. Section 4 (d) provides that "no change shall be made by any natural-gas company in any such,[7] rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto" except upon filing of new schedules and 30 days' notice to the Commission and to the public; however, the Commission may, by order, permit the rates to take effect without such notice. When any such new schedule is filed, the Commission has authority under Section 4 (e) to enter upon a hearing as to the lawfulness of the rate proposed.[8] Pending the hearing and decision, the

[7] The "such" refers to Section 4 (c), *infra*, p. 101, which provides:

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all *contracts* which in any manner affect or relate to such rates, charges, classifications, and services." [Emphasis added.]

[8] The Commission's rules require that every proposed change be supported by the inclusion in the filing of data necessary to enable the Commission to appraise the change. If an increase is involved, a justification therefor must be included in the filing with a comparative study of sales and

Commission may suspend the proposed rates for a maximum of five months beyond the time when the rates would otherwise go into effect, except that the Commission has no authority to suspend a rate "for the sale of natural gas for resale for industrial use only." At the end of the suspension period, if the proceedings have not been completed, the company may put the proposed rates into effect, subject to refund of the amounts, if any, later found to be unreasonable by the Commission.

Under this procedure, the Commission is not required to enter upon a hearing; it may do so under its practice if its study of the supporting data filed with the increase (see n. 8 *supra*, pp. 20–22) shows that the proposed rate may be unlawful. If no hearing is ordered, the rates become effective at the

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revenues under the old and new rates, a comparison of the new rates with other rates charged by the seller for similar services, and plant and operating data providing the information necessary for a determination of the cost of rendering the service. 18 C. F. R. 154.63, 35.3. The Commission has described its procedure upon receipt of such filings as follows (F. P. C. Annual Report, 1940, p. 71):

"* * * In each case the staff checks the accuracy of the information submitted, makes the necessary analyses and comparisons and studies the operating conditions involved, in order to determine whether there is evidence of unreasonableness or discrimination. The results of these studies are summarized in the form of brief reports on which the Commission acts.

"When the review of current rate filings indicates the desirability of a more complete analysis, or in response to complaints concerning rates already filed, the staff undertakes a preliminary investigation. Such studies provide suf-

close of the notice period.[8] If the Commission does hold a hearing, it relates, as the court below explicitly recognized (R. 143), to the reasonableness of the *proposed rate*.

The second procedure for effecting a change in rates is set out in Section 5 (a) App., *infra*, pp. 103–104. Under that Section, new rates may be fixed by order of the Commission but only after a hearing and a finding that the existing rate is unreasonable or otherwise unlawful. A proceeding to this end may be instituted by the Commission on its own motion or upon the complaint of "any State, municipality, State commission, or gas distributing company." Section 5 (a) provides that whenever in such a proceeding the Commission finds unreasonable "any rate, charge, or classification" or "any rule, regulation, practice, or contract affecting such rate, charge, or classification," it shall determine and fix the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed. In contrast to

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ficient information for decisions as to the necessity or feasibility of formal action. * * *"

[8] The rate filed by a natural gas company pursuant to Section 4 (d) is, upon becoming effective, the legal rate, enforceable in the same way as a Commission-determined rate. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, holding (at 251):

"[Petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

As pointed out in more detail *infra*, pp. 33–35, a filing may be rejected for formal or procedural defects but it may not be rejected, without a hearing, on substantive grounds.

Sections 4 (d) and 4 (e), rate changes under Section 5 (a) may be made only pursuant to an order made after a hearing addressed to the reasonableness of the *existing rate*.

While both procedures are addressed to the same general subject matter, *i. e.*, the changing of existing rates charged by a natural gas company, it is clear that each procedure is available only in certain prescribed situations. The Section 4 (d) and 4 (e) mechanism is to be used only when a natural gas company seeks to change its rates. Section 4 (d) not only expressly prohibits a gas company from changing its rates without complying with the procedure therein set out, but makes no provision for its invocation by anybody else. In contrast, Section 5 (a) permits the initiation of the procedure there provided by the Commission or by "any State, municipality, State commission, or gas distributing company";[10] significantly, natural gas companies are omitted from the detailed enumeration of those authorized to invoke Section 5 (a).[11] Thus, Sections 4

[10] "Gas distributing company" evidently refers to a local distributor of gas, such as Mobile, which purchases from the natural gas company the gas transported by it in interstate commerce. See Section 1 (b) of the Gas Act; R. 3.

[11] The corresponding provision of Section 206 (a) of the Federal Power Act, *infra*, p. 106, has the same effect. While it is phrased, "whenever the Commission, after a hearing had upon its own motion *or upon complaint*, shall find" (etc.), Section 306 of that Act, *infra*, p. 107, which deals with *complaints* generally, is limited to those "complaining of anything done or omitted to be done by any * * * public utility." Plainly, the selling public utility may not file such a complaint against itself.

(d) and (e) and Section 5 (a) together deal with all situations in which rate changes may be sought and each procedure complements the other, with no overlap. Rate changes when initiated by a gas company are processed under Sections 4 (d) and 4 (e), and when begun by some one other than the natural gas company itself are governed by Section 5 (a).

Since the clear language of the Act permits a *natural gas company* to seek a rate change only under the filed rate procedure of Sections 4 (d) and 4 (e), the Commission had no choice, when United filed its new schedules, but to follow, as it did, the procedure prescribed in these sections.[12] Indeed, the Commission exercised the full discretion it had under this procedure in favor of Mobile. The Commission refused to permit the proposed rate increases to be effective prior to the expiration of the thirty-day notice period, and, on its own initiative, it "enter[ed] upon a hearing concerning the lawfulness of such rate, charge, classification, or service" (Section 4 (e), *infra*, p. 102, see *supra*, pp. 5–6). In addition, "pending such hearing and the decision thereon," the Commission suspended the operation of the suspendible new schedules for five months but

[12] Under the corresponding sections of the Federal Power Act, the Commission has recognized that the utility is authorized to proceed only under the filed rate provision, and not by complaint. *City of Los Angeles* v. *Nevada-California Electric Corp.*, 2 F. P. C. 104, 108–09. See, fn. 11, *supra*, p. 23.

under the terms of the proviso prohibiting suspension of rates for sales for resale for industrial use the Commission was powerless to prevent the proposed increase for the Mobile-Ideal sale from becoming effective at the end of the thirty-day notice period.

2. The court below disregarded the Act's clear language and structure, and held instead that—solely because United's proposal would supersede the rate agreed to with Mobile and Mobile had not consented to the change—the Commission was required to follow the Section 5 (a) procedure of hearing and determination as to the reasonableness of the existing contract rate.[13]

(a). However, the existence of a contract rate, which the court below regarded as decisive, plays no part in fixing the procedure to be followed in processing a rate change. The general principle

[13] This holding was plainly based on statutory grounds, *i. e.*, that the Commission had misread the Act, and not on constitutional grounds. It is clear that there is no constitutional defect in the Act as interpreted by the Commission. Aside from the general subordination of utility contracts to regulatory legislation—discussed immediately below in the text—it has been specifically decided by this and other courts that a legislature may provide that, without any order of the regulatory commission, rates filed by a utility go into effect and supersede contract rates at once, although subject to subsequent administrative action. *E. g.*, *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.*, 245 U. S. 633; *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, 151; *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243, 248, 252–54. See *infra*, pp. 49–50, 58–68.

is established that utility contract rights are always subject to the continuing power of the legislature and its authorized delegates: *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 482; *Producers Transp. Co.* v. *R. R. Comm.*, 251 U. S. 228, 232; *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, 375–376; *Armour Packing Co.* v. *United States,* 209 U. S. 56, 82; *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109. The holdings under the Natural Gas Act are to the same effect; contracts are fully subject to the Act. See *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C. A. 5), certiorari denied, 332 U. S. 770; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (C. A. 6); *Mississippi River Fuel Corporation* v. *Federal Power Commission,* 121 F. 2d 159, 163 (C. A. 8). See also *infra,* pp. 90–96.

The same considerations which support the general principle of subordination of private utility contracts to public regulation indicate why, in the specific field of rate fixing, Congress would have little reason to accord contract rates greater stature than other forms of rates. As between the parties, contracts do have, of course, a special status in our law. But the dominant factor in rate regulation is not the purely private interests or rights of the particular parties *inter se,* but the reasonableness of the rate in the light of the public interest. See *e. g., Federal Power Commission* v.

Natural Gas Pipeline Co., 315 U. S. 575, 585–6; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 600–603. And the fact that the existing rate was fixed in a private contract would have little, if any, bearing on the determination of the reasonableness of the proposed increase, or for that matter, of the contract rate. For in agreeing upon the rate, the parties were motivated primarily by private considerations whereas the Commission is bound to consider the question in the light of the rate structure generally and of the public interest. Thus, while a utility may feel impelled to grant a low rate to one purchaser in order to obtain the business, that rate may be out of line with the rest of its rate structure and thereby, without warrant, relieve the purchaser of paying his proper share of the burden of providing a reasonable return to the utility.[14] In this connection, it is significant, we believe, that of all the states, only Connecticut and Washington (and the latter only as to old contracts) place contract rates generally in a preferred category. (And this has been done in those two jurisdictions by specific legislation, and not by judicial decision.) See *infra*, pp. 70-71. The almost universal practice is that all rate forms

[14] See *Duquesne Light Co.* v. *Public Service Commission*, 273 Pa. 287, 296; cf. *Public Service Commission* v. *Great Northern Utilities Co.*, 289 U. S. 130, 132–133; *Tyler Gas Service Co.* v. *United Gas Pipe. Line Co.*, 217 F. 2d 73, 77 (C. A. 5).

are on the same plane and are to be treated in the same manner.

(b). Specifically, as to the problem at hand, there is nothing in Sections 4 (d) and 4 (e) or Section 5 (a) of the Gas Act to support the conclusion that Congress (unlike the very great majority of the states) has made the existence of a contract relevant in determining whether Sections 4 (d) and 4 (e) on the one hand, or Section 5 (a) on the other, is applicable. On the contrary, the Act precludes any such distinction. The first sentence of Section 4 (d) defines that and the succeeding subsection (e) as applying to "any such[15] rate, charge, classification, or service, or * * * any rule, regulation, or *contract relating thereto.*" [Emphasis added.] Section 5 (a) provides that it applies to "any rate, charge, or classification * * * or * * * any rule, regulation, practice, or *contract affecting such rate, charge, or classification* * * *" [Emphasis added.]

Both sections thus refer in parallel terms to changes in "any rate, charge, classification * * * or * * * any rule, regulation or *contract.*" By failing to provide any distinction based on the source or form of the existing rates—*i. e.*, whether they were fixed by the Commission or by the natural gas company alone or by agreement with the purchaser—the Act on its face refutes the

[15] See *supra*, fn. 7, p. 20.

result below that Section 5 (a), rather than the filed rate procedure of Sections 4 (d) and 4 (e), is applicable to rate increases proposed by a gas company solely because of the contract form of the existing rate or the lack of the purchaser's assent. Cf. *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388, 390–391 (C. A. 5), certiorari denied, 332 U. S. 770. The distinction between Section 4 and Section 5, as we have pointed out, is in the source of the proposal for a change in the rate and not in the source or character of the existing rate itself.

(c). Nor is the result below aided by Mobile's contention (R. 12; Br. in Opp. 4) that "contract," as used in Section 4 (d), refers only to the situation where the purchaser has agreed to the rate change. While "contract" suggests an agreement between two or more parties, it is significant that what Section 4 (d) deals with is not the contract itself, but rather with *changes* in the contract. And as to changes, Section 4 (d) concerns those "made by any natural-gas company."[16] This provision plainly imposes no requirement that there be a concurring party to the change. As pointed out below (pp. 37–39), the Commission's regulations provide for filings of proposed changes under Section 4 (d) only by

[16] Unless the Commission otherwise orders, *no change shall be made* by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, * * *" [Emphasis added.]

the natural gas company (18 C. F. R. 154.1–.86) and, as United's history indicates, all changes in contracts whether or not agreed upon have been filed by that company alone (R. 55–58).

Furthermore, the Section is explicit in providing that a change in any "rate * * * or in any * * * contract relating thereto" may be made only after notice which "shall be given by filing with the Commission and keeping open for public inspection new *schedules* * * *." It is noteworthy that the statutory language refers not to "new contracts," which might imply concurrence of the customer, but rather to "new schedules," which contemplates an action initiated by the selling natural gas company alone.

(d). Moreover, if "contract" in Section 4 (d) were read as Mobile contends, the same reading would also govern the parallel term "contract" as it appears in Section 5 (a) *infra*, pp. 103–104. Such a restricted reading would prohibit the Commission from ordering, without the purchaser's assent, a change in rates embodied in contracts even after it had determined, after hearing in accordance with Section 5 (a), that the contract rate is unlawful. The result would be to prevent any rate change over the purchaser's objection. Apparently recognizing that such a reading would completely frustrate rate regulation by the Commission, Mobile and the court below both accept the view that the Commission may, in such circumstances, direct a change in contract rates,

as well as other rates, without the purchaser's assent. Indeed, Mobile contends and the court below held that United should properly have sought to invoke the Section 5 (a) procedure (R. 12, 32, 142, 146–48). Obviously, then, "contract" in Section 5 (a) has no such limiting meaning, and since there is nothing in the Act to show that, contrary to the usual rules of construction, "contract" is to be read differently in the two sections,[19] it follows that "contract" in Section 4 (d) also has no such restricted scope.

(e). Perhaps in a bold effort to hurdle the textual difficulties of its position, Mobile insists

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[17] See *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (C. A. 10), affirmed, 324 U. S. 581; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 121 F. 2d 159 (C. A. 8).

[18] Since, as already shown, *supra*, pp. 23–24, United as a natural gas company could not initiate rate changes under Section 5 (a), the only avenue open to United would be the circuitous method of requesting the Commission to initiate a Section 5 (a) proceeding on its own motion.

[19] It is ordinarily assumed that the same words used by Congress in different parts of the same act are intended to convey the identical meaning. *United States* v. *Cooper Corp.*, 312 U. S. 600, 606–07; *United States* v. *Hill*, 123 U. S. 681, 685–86; *Alexander* v. *Mayor and Commonalty of Alexandria*, 5 Cranch 1, 6–7. While this natural presumption will yield when the words are found in such dissimilar connections as to warrant inference of different intent (*Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87; *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, 433), no such difference can be read into the use of "contract" in Sections 4 (d) and 5 (a) of the Gas Act. Both sections employ the same term in the same context, *i. e.*, setting forth procedures for a change in rates.

on broadly posing the "real question" as "whether the passage of the Natural Gas Act automatically abrogated the right to enter into private rate contracts" (Br. in Opp. 6).[20] But the semantic inflation of the colorful words "automatically abrogated" cannot survive the prosaic and traditional reality of the filed rate procedure of Section 4. Under that system, private rate contracts, far from being "automatically abrogated" by the Gas Act, are specifically envisaged as continuing to be made and to be enforced (see *infra*, pp. 51–55); they are as valid, lawful, and enforceable as they have always been. But they also continue to be contracts for rates charged by a regulated company and as such continuously subject to modification or termination in accordance with prescribed procedures. See *supra*, pp. 25–27.

What Section 4 does is to establish the method by which these still-existing rate contracts can be changed at the instance of the gas company—in effect, a "post-audit" procedure leaving it to the Commission to determine the extent to which it need review the gas company's new rates in a formal hearing. Another route for change—available to the Commission, state agencies, and purchasers—is provided by the Section 5 "audit" procedure under

[20] The court below adopted the same approach (R. 148), as did the Court of Appeals for the District of Columbia Circuit in *Sierra Pacific Power Co.* v. *Federal Power Commission*, pending on writs of certiorari, Nos. 51, 53, this Term.

which the change cannot take place until after a hearing and determination on the existing rate. In neither case is the rate contract "automatically" or "unilaterally" "abrogated" in any true sense; in both cases, it survives healthily with the special incidents and character which have long been integral to utility rate contracts.

(f). Similarly, we need not stop long to point out the fallacy in Mobile's contention that it fully recognizes the filed rate procedure of Section 4 when it insists that the new rate must now be rejected as "unlawfully filed" but will become "lawfully filed" under that Section after it survives a hearing under Section 5 (Br. in Opp. 3). Such an interpretation of the filed rate system plainly destroys the signal differences between Sections 4 and 5 in favor of exclusive application of Section 5. In reality, Mobile is arguing that Section 5 alone applies to contract rates,[21] and that contention must face the formidable difficulties discussed above and the others yet to be presented.

The simple truth is that under Sections 4 (d) and 4 (e) the Commission has no authority to make a substantive determination as to the propriety of rate changes proposed by a gas company

[21] This is revealed clearly in Mobile's brief in opposition in No. 17, pp. 4–5, 8–10.

in advance of acceptance for filing and to reject the filing on such grounds. Although the Commission may reject a filing where the formal requirements are not met (*Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, 902 (C. A. 3))—for example, where there has been a failure to submit sufficient and proper supporting data (*Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (C. A. 4); cf. *North Pac. Coast Freight Bur.* v. *Department of Public Works*, 156 Wash. 137)—when there has been compliance with the formal filing requirements Section 4 (e) presents the entire range of alternative actions by the Commission.[22] According to the unambiguous provisions of that Section, "whenever any such new schedule is filed," the Commission's sole authority is to permit the rate to become effective without a hearing, to enter upon a hearing as to the reasonableness of the proposed increase, to suspend pending the outcome of the hearing the proposed increases except those for industrial resale, and to disallow the excess, if any, over the amount found to be reasonable. Plainly, such a provision con-

[22] The Commission's regulation provides that the filing date is the date the schedule "is received in the office of the Secretary of the Commission for filing in compliance with the requirements of this part." 18 C. F. R. 154.15. That acceptance of the filing is not the occasion for determining the propriety of a change in rate is shown by 18 C. F. R. 154.23, which provides that such acceptance "is not to be considered as approval by the Commission."

templates that substantive determinations be made not contemporaneously with the filing, but rather after the filing. Cf. *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d at 902:

> * * * On the face of Section 4 of the Natural Gas Act * * * it is clear that, Mississippi's proposed tariff changes having been duly filed, the Commission had only two alternatives. By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. It purported to follow a third course, rejection without hearing—a course for which it cannot show even color of statutory authority.[23]

B. THIS PROCEDURE HAS BEEN FOLLOWED CONSISTENTLY BY THE COMMISSION ON RATE INCREASE FILINGS BY SELLING COMPANIES IRRESPECTIVE OF CONTRACT

The Commission's opinions and orders make clear that it has consistently followed the filed rate procedure in circumstances such as are here involved. See, *e. g.*, *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F. P. C. 1044, petition for review dismissed, 170 F. 2d 150 (C. A. 8); *Re Panhandle Eastern Pipe Line Co.*, 9 F. P. C.

[23] See also *infra*, pp. 95–98.

443, 444–446; *Re Mississippi River Fuel Corp.*, 2 F. P. C. 170, 175–176, affirmed, 121 F. 2d 159 (C. A. 8); see also cases cited *infra*, p. 90, as well as *City of Los Angeles* v. *Nevada-California Electric Corp.*, 2 F. P. C. 104, 108–109; and *Pacific Gas and Electric Company*, F. P. C. Docket No. E–6482, order issued June 17, 1954, reversed *sub nom. Sierra Pacific Power Co.* v. *Federal Power Commission*,—F. 2d—(C. A. D. C.), pending on writs of certiorari Nos. 51, 53, this Term (both applying the similar filed rate provision contained in Section 205 of the Federal Power Act).

In the early *Mississippi River Fuel* case, where the gas company sought, as United did here, to increase existing rates embodied in a contract, the Commission followed the procedure of Sections 4 (d) and 4 (e). There, as here, the Commission entered upon a hearing of the reasonableness of the proposed rate and suspended the effectiveness of all the proposed increases except those for industrial resale which, not being suspendible, were permitted to become effective. See 2 F. P. C. at 172.[24] Subsequent practice has

[24] While Mississippi River later contended that the proposed increases were pursuant to agreement with its customer, the schedules filed apparently did not so indicate. The company's contention was made in an effort to escape suspension and hearing, on the theory that agreed-upon changes were not the changes contemplated by Section 4 (d), to be initiated by the natural gas company alone. The Commission's opinion leaves little doubt that it made no distinction between

continued to be under the filed rate procedure. For instance, when United, in 1952, undertook to comply with the Commission's requirement that all rates be converted from a percentage basis to a fixed dollars and cents amount (see *supra*, p. 4 and fn. 3), United simultaneously sought to increase its rates for a number of its sales, many of which were clearly embodied in contracts; upon receiving objections to the increases, the Commission followed the procedure of Sections 4 (d) and 4 (e) (R. 60–64).

The Commission's consistent construction is manifest not only from its actions in particular cases but by its regulations, which have uniformly adhered to the principle that the filed rate procedure is applicable whenever a gas company seeks to increase its rates, without regard to whether the existing rate is embodied in a contract or the change has been assented to by the purchaser. No distinctions are drawn between contract-embodied rates and others. All rates for natural gas, whether originally established by contract or otherwise, are now filed in the form of tariffs (18 C. F. R. 154.21, 154.31–.41, 154.82). An unexecuted copy of each form of contract is filed as subsidiary to the tariff (18 C. F. R. 154.40) with an index of purchasers listing the date of execu-

changes sponsored by the gas company alone and those agreed to by the purchaser. As far as the Commission was concerned, both came under the filed rate procedure. 2 F. P. C. at 172, 176.

tion of the contract, the effective date, and the term (18 C. F. R. 154.41); the executed contracts are separately filed (18 C. F. R. 154.26). Lumping all types of rates together, 18 C. F. R. 154.63 (a) refers to "the filing of any tariff, executed service agreement or part thereof which changes or supersedes any tariff, contract or part thereof on file with the Commission * * *." Similarly, 18 C. F. R. 154.63 (b) (2) requires:

> A comparative statement of sales made or transportation performed and revenues therefrom, by months, under the present and proposed tariff, contract, or part thereof, each applied to the transactions for the twelve months immediately preceding and for the twelve months immediately succeeding the proposed effective date of the change in tariff, contract or part thereof. * * *

and 18 C. F. R. 154.63 (b) (3) goes on to provide:

> If the proposed change in tariff, contract or part thereof will result in an increase in rates or charges, there shall be submitted in support of the proposed increased rate or charge a statement showing the cost of service for the entire system, and also the cost allocated to the particular service or classification for which the increase in rates or charges is proposed, together with an explanation of the allocation methods.

In this listing of the data to be submitted in support of the proposed increase, there signifi-

cantly is no reference to the original source of the rate.[25] Finally, 18 C. F. R. 154.85, relating to the status of restated contracts, provides:

> Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: * * *

Together with the uniform practice, these provisions of the regulations make plain the Commission's view that no special treatment need be accorded a tariff replacing a rate agreed upon by the gas company and the purchaser by private contract. If there were any doubt as to the propriety of the Commission's action in this case, this consistent administrative practice is, of course, entitled to great weight in resolving that doubt in favor of the Commission. See, *e. g.*, *United States* v. *Public Utilities Commission*, 345

[25] The regulations provide for notice to the purchasers affected (18 C. F. R. 154.16, .22, .63 (a)) and for subsequent comments thereon by "any purchaser or other interested party" (18 C. F. R. 154.27). It should be noted, however, that the purchaser's participation is permitted, not required, that it occurs after the filing, and that no distinction is made beween purchasers under a contract and others.

U. S. 295, 315; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

II

THE COMMISSION'S FILED RATE PROCEDURE UNDER SECTIONS 4 (d) AND 4 (e) ACCORDS, AS CONGRESS INTENDED, WITH THE USUAL PROVISIONS OF UTILITY REGULATORY STATUTES

The legislative history of the Natural Gas Act does not furnish a direct or conclusive answer to the question presented in this case, but all the indications, those of omission as well as of commission, support the Commission's position that contracts have no special exemption from the filed rate system. Perhaps the most significant element in the legislative history on this point is the repeated assurance that the Gas Act contains only the usual provisions of utility regulatory statutes; this key opens the door to a survey of comparable federal and state legislation which shows that the prototype of all such regulations, the Interstate Commerce Act, as well as the overwhelming majority of state statutes, do *not* exempt changes in contract rates from the filed rate procedure.

A. THE LEGISLATIVE HISTORY OF THE NATURAL GAS ACT

1. The salient factors in the legislative history of the Gas Act are the meagerness of discussion on the methods of changing rates and the absence of any comment on the applicability of the filed

rate procedure to changes in rates embodied in private contracts. These circumstances suggest, in themselves, that Congress intended the rate provisions of the Act to be read as the Commission has done, in accord with their plain and ordinary meaning, and consequently regarded explanatory comment as unnecessary.

This conclusion is buttressed by the few references to Section 4 in the legislative history, where, in each instance, the procedure there set out was treated as a rate changing method of general applicability. Since Congress was fully aware that relations between gas companies and their purchasers were typically fixed by contract (see S. Doc. No. 92, Part 84–A, 70th Cong., 1st Sess., pp. 133–134, 145–154, 164–214), it would seem that had Congress intended to excise contract rates from the filed rate procedure it would have included express statutory language to that effect, or at least have so indicated at some time during the consideration of the Act. This is particularly so since the effect of so excluding contract rates would cut down substantially the scope of Sections 4 (d) and 4 (e).

But there is no such indication. On the contrary, in describing the Act by sections, the committee reports state that 4 (e) "requires the filing of schedules and *contracts* relating to all rates and charges subject to the jurisdiction of the Commission; and, under the provisions of subsection (d), no change may be made in *such rates* except after 30 days' notice. Subsection (e) authorizes the Commission

to hold hearings concerning the lawfulness of *any proposed change* in rates, and to suspend such rates for not over 5 months, pending such hearing." [Emphasis added.] H. Rep. No. 709, 75th Cong., 1st Sess., p. 5; S. Rep. No. 1162, 75th Cong., 1st Sess., p. 4. The breadth of those statements, particularly the reference to "*any* proposed change," manifests an intent to include contract rates in the provision subjecting *all* changes in filed rates proposed by a natural gas company to the filed rate provisions of Sections 4 (d) and 4 (e). This broad scope was ascribed to these Sections by the Commission's Solicitor before the House Committee with respect to the similar provision of a predecessor bill. See Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., pp. 28–29.[26]

2. The court below believed that there were stronger indications in the legislative history

[26] "Mr. LEA. Mr. DeVane, under what conditions would rates be put into effect? That is, what would be the procedure?

"Mr. DEVANE. In the beginning?

"Mr. LEA. Yes.

"Mr. DEVANE. The companies will simply file their schedules.

"Mr. LEA. And those schedules would prevail unless the Commission saw fit to, after a hearing and notice, establish a rate?

"Mr. DEVANE. Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing

of a contrary congressional intent in accord with its holding. This it found in a colloquy between Congressman Halleck and a representative of the Illinois Commerce Commission, in which the latter stated that his commission intended to proceed under the proposed legislation to ask the Federal Power Commission to review the contract rates of Natural Gas Pipeline Co. (R. 149–150).[27] But since the discussion deals with a contemplated complaint by a state utility commission as to the

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are the rates that will continue in effect until they are changed either by the company, as provided in section 4, or by the Commission after hearing. * * *

"Mr. COOPER. And anyone who wants to file a complaint goes to the Commission; is that right?

"Mr. DEVANE. That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under Section 4 (d). After they have filed them with the Commission and announced those new rates, the Commission has the power to suspend and investigate, and the suspending power extends for a period of 5 months."

[27] As set out in the court's opinion, this colloquy was as follows (R. 149–150):

"Mr. HALLECK. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract *could* be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?

"Mr. BOOTH. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return upon the fair value of its property. [Emphasis supplied by court.]

"Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 4008, at page 43."

reasonableness of existing rates, Section 5 (a) would clearly be applicable (see *supra*, pp. 22–24), and hence the colloquy does not support the holding below as to the scope of Sections 4 (d) and 4 (e).

3. The Court of Appeals also derives comfort from the statements in the committee reports and floor debates that the Act contained "the usual provisions * * * such as we find in all regulatory measures enacted by Congress' and * * * 'there was nothing novel in its provisions'". (R. 150–151). See 81 Cong. Rec. 6722; S. Rep. No. 1162, 75th Cong., 1st Sess., p. 3; H. Rep. No. 709, 75th Cong., 1st Sess., p. 3; H. Rep. No. 2651, 74th Cong., 2d Sess., p. 3. In addition, the court noted that "there was virtually no opposition to the bill from any source" (R. 151). 81 Cong. Rec. 6725. Since, according to the court, the Commission's construction of Sections 4 (d) and 4 (e) was of "a radical nature" (R. 154), the conclusion was drawn that this legislative history supported its result.[28]

[28] The court also referred to the statement of the Congressman who introduced the amendment prohibiting the suspension of rates for industrial resale that its purpose was "to prevent suspension in cases of industrial use *where there were short term contracts*" [emphasis by court] (R. 152; 81 Cong. Rec. 6727). From this, the court drew the implications (1) that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates, and (2) that Congress did not visualize the situation where "one of the contracting parties is attempting

However, the Commission's reading of Sections 4 (d) and 4 (e) is not radical. Rather, as we shall now show, it accords not only with the accepted construction of the comparable provisions of the Interstate Commerce Act, on which Sections 4 (d) and 4 (e) were modelled, but also with the similar interpretations of the analogous provisions of state public utility regulatory statutes, which make widespread use of the filed rate procedure. In this light, there can be no doubt that, as applied by the Commission, the filed rate procedure of Sections 4 (d) and 4 (e) is not novel and does not depart from the usual regulatory provisions.[29]

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under the cover of the Act to avoid its contractual duties" (R. 152–153). Both implications lose all validity when it is remembered that the contracts Congressman Lea was talking about were not those between the natural gas company and its purchasers, such as is here involved, but rather between the purchaser and the company to which it resold the gas for direct industrial use; as to the latter, of course, the Commission has no jurisdiction under the Gas Act. Read in this light, the explanation simply was that since the contract for resale of the gas for industrial use was typically short term only, an increase in cost of the gas to the reseller could be adjusted and passed on with relative ease so that there would be little injury to the reseller in prohibiting suspension of increases proposed by the gas company.

[29] Since the Commission's reading of Sections 4 (d) and 4 (e) accords with the usual pattern of rate regulation, the reliance by the court below (R. 148) and by Mobile (Br. in Opp. in No. 17, p. 7) upon statements from this Court's opinion in *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, is misplaced. Also, as pointed out above (*supra*, pp. 31–33), the filed rate procedure, as ap-

B. THE FILED RATE PROCEDURE OF THE INTERSTATE COMMERCE ACT, ADOPTED IN THE NATURAL GAS AND FEDERAL POWER ACTS, APPLIES TO CONTRACT RATES

1. When the Federal Water Power Act was passed in 1920, Congress provided in Section 20 that rate regulation should be, as far as applicable, "according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce * * *." 41 Stat. 1063, 1074, 16 U. S. C. 813. In 1935, when Congress exercised its regulatory power over interstate electric utilities in Part II of the Federal Power Act and in 1938, when the Natural Gas Act was passed, the methods for changing rates in both Acts were specifically detailed; both were in substantially the same form,[39] and both were "taken bodily" from the Interstate Commerce Act, with a few pertinent changes. *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 806–807 (C. A. 4); see also *Northwestern Public Service Co.* v. *Montana-Dakota Co.*, 181 F. 2d 19, 22 (C. A. 8), affirmed, 341 U. S. 246.

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plied in this case, does not abolish or abrogate preexisting rights in the sense to which the Court was referring in *Niagara Mohawk*.

[39] The filed rate provisions of the Natural Gas Act, Sections 4 (d), (e), are essentially the same as corresponding sections in the Federal Power Act, Sections 205 (d), (e), *infra*, pp. 104–106. See Hearings before a Subcommittee of the House Committee on Interstate & Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., p. 28. The same likeness is evident in the complaint, hearing, and order procedure of both Acts. Natural Gas Act, Section 5 (a); Federal Power Act,

Examination of the Interstate Commerce Act reveals how clearly the rate provisions of the Gas Act (and the Power Act) parallel those of the earlier statute. Section 6 (3) of the Commerce Act, 49 U. S. C. 6 (3), *infra*, pp. 108–109, provides that no change shall be made in the rates filed and published pursuant to the Act except after thirty days' notice to the Interstate Commerce Commission and the public. Section 15 (7), 49 U. S. C. 15 (7), *infra*, pp. 111–113, goes on to declare that, whenever a schedule is filed stating a new rate, the Interstate Commerce Commission has authority to enter upon a hearing into the reasonableness of the proposed rate, suspend the proposed rate for a specified maximum period pending the outcome of the hearing, and if the Commission has not made its determination by the time the suspension period expires, the proposed rate goes into effect with the excess, if any, over a reasonable rate being subject to refund. This procedure is the same as the filed rate system of the Gas and Power Acts.

On the other hand, Section 15 (1), 49 U. S. C. 15 (1), *infra*, pp. 110–111—the analogue of Section 5 (a) of the Gas Act and Section 206 (a) of the Power Act—provides for a Commission hearing into the reasonableness of an existing rate upon complaint or upon the Commission's own motion; Section 13, 49 U. S. C. 13, *infra*, pp. 109–110, enumerates those who may make such a complaint.

When the Interstate Commerce Act's filed rate procedure first came before the courts, it was held that the rates filed and in effect under the Act were the only legal ones (*Kansas City So. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573; *Texas & Pac. Ry.* v. *Cisco Oil Mill*, 204 U. S. 449), and that such filed rates could not be affected by a subsequent agreement unless the later agreed-upon rate was made effective under the Act. *Kansas City So. Ry. Co.* v. *Albers Commission Co., supra.* When proposed rates were filed, the Commission's decisions whether to enter upon a hearing and whether to suspend the proposed rates pending a hearing were held to be within its administrative discretion. *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y.); *Merchant Truckmen's Bureau* v. *United States*, 16 F. Supp. 998 (S. D. N. Y.); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E. D. Va.); *M. C. Kiser Co.* v. *Central of Ga. Ry. Co.*, 236 Fed. 573 (S. D. Ga.), affirmed, 239 Fed. 18 (C. A. 5); see *Board of R. R. Comm'rs.* v. *Great Northern Ry. Co.*, 281 U. S. 412, 429. Rates which went into effect for failure of the Commission to suspend them, or upon the discontinuance of a rate proceeding, were described as "carrier-made rates." *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 687; *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370; *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 494 (E. D. Va.).

The impact of a change in rate, filed by the carrier, upon a contract-fixed rate—the precise issue in this case—was specifically considered by this Court in *Armour Packing Co.* v. *United States*, 209 U. S. 56. Armour made a six-months' contract with a railroad in June 1905, at the filed rate then in effect. An increase in the rate was filed by the railroad and published in August 1905, and then went into effect without hearing or order. Armour continued, however, to pay the contract rate. This Court held that the subsequently filed rate was the only legal rate and that Armour was properly convicted of violation of the Elkins Act (209 U. S. at 80–83). Justice Day, writing for the Court, summarized the equitable considerations advanced by Armour in favor of protecting the shipper and giving effect to the contract rate. 209 U. S. at 81–82. It might be, the opinion observed, that such contracts should be recognized, "giving stability to rates for limited periods", and that "the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done". 209 U. S. at 82. However, Justice Day went on to state that these were legislative considerations; the Act was clearly within the regulatory power of Congress and, under it, a filing by the carrier clearly changed the existing rate, even though the superseded rate was embodied in a private contract with a shipper (*ibid.*).

This square ruling is highly persuasive here, in accordance with the accepted principle that where provisions of one statute have been adopted by another, the interpretation which has been authoritatively placed upon the former applies to the latter also,[31] a principle which has already been applied to the rate provisions of the Gas and Power Acts. *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 806–807 (C. A. 4); *Northwestern Public Service Co.* v. *Montana-Dakota Co.*, 181 F. 2d 19, 22 (C. A. 8), affirmed, 341 U. S. 246; cf. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585.

While, in our view, *Armour* constitutes a clear decision by this Court sustaining the effectiveness, under the filed rate procedure, of a filing by a utility to supersede a rate embodied in a contract, the court below undertook to distinguish *Armour* (R. 150, fn. 10). Pointing out that, unlike the Interstate Commerce Act, the Natural Gas Act provides for filing of rate contracts and quoting the observation of Justice Day set out *supra*, p. 49, the Court of Appeals commented, "As we have seen this possible course outlined by the Supreme Court in *Armour* has been followed in the later Natural Gas Act" (R. 150, fn. 10). The Third Circuit thus took the view that, since

[31] E. g. *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65; *United States* v. *C. I. O.*, 335 U. S. 106, 112–113.

the Gas Act provides for the *filing* of rate contracts with the Power Commission, that single circumstance—without more and without regard to the further provisions of the Gas Act—made such contract rates immune from change by the gas company under the filed rate procedure.

(a). While the Interstate Commerce Act, without mentioning contracts, requires that "schedules showing all the rates, fares, and charges" be filed and kept open for public inspection (Section 6 (1), 49 U. S. C. 6 (1), *infra*, pp. 107–108), the Power Act and Gas Act supplement this requirement with a like filing requirement for "all contracts which in any manner affect or relate to such rates, charges, classifications, and services." Natural Gas Act, Section 4 (c); Federal Power Act, Section 205 (c). Similarly the Commerce Act's filed rate section and the complaint, hearing, and order provision refer to changes in rates but do not mention contracts, while the corresponding sections of the Gas and the Power Acts explicitly authorize changes in "rates * * * or in any * * * contract relating thereto." Natural Gas Act, Sections 4 (d), 5 (a); Federal Power Act, Sections 205 (d), 206 (a).[32] But there is a good reason for

[32] Another difference is that the Interstate Commerce Act and the Federal Power Act provide for suspension of all filed changes in a rate; the Natural Gas Act contains a similar provision except that it excludes from suspension proposed rates of gas for industrial resale. See Interstate Commerce Act, Sec. 15 (7); Federal Power Act, Sec. 205 (e); Natural Gas Act, Sec. 4 (e).

the difference, wholly apart from any cryptic attempt by Congress to change the *Armour* rule.

The difference in language and Congressional policy regarding rate contracts is explicable by the dissimilarity in nature of the industries being regulated. Railroads transport innumerable kinds and quantities of goods for many persons between various points on their lines and facilities must be available for all patrons. The Commerce Act's purpose to require uniform treatment of shippers could best be accomplished by requiring compliance with schedules of general applicability; permitting private contract rates would make even more complex the already elaborate railroad rate structure and, by the sheer weight of numbers, make the administrative burden unmanageable, with the result that the private contract would provide an easy way to circumvent the Commerce Act's prohibition against discrimination. Cf. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399.

The very large number of retail transactions involved in railroad rate regulation present an entirely different administrative problem from the relatively few wholesale interstate transactions regulated by the Gas and Power Acts. The latter typically require substantial investment in capacity and facilities for the service of the particular customers. Consequently, gas and power companies' relations with their customers

are ordinarily first arranged by contract and, because of the limited numbers of purchasers, control over the rates embodied in these contracts apparently was not expected to create a substantial administrative burden or to frustrate the prohibitions against preferential rates.[33]

In short, while Congress recognized contracts in the natural gas and electric utility fields, it had no purpose to endow them with a special status or greater dignity than other forms of rates; on the contrary, its aim was merely to eliminate, for the new legislation, the Commerce Act's prohibition on contracts and to give them the same status and the same dignity as the other forms of rates—to lift contracts to par, not place them on a higher plane.

(b). Accordingly, while the Gas Act, in Section 4 (c), *infra*, p. 101, recognizes contracts relating to rates by providing for the filing of such contracts with the Commission, the Act does not give them an immunity from change denied under the Interstate Commerce Act or denied to other rate forms under the Gas Act. Rather, as we have already pointed out (*supra*, p. 51), Section 4 (d) goes on to make the filed rate procedure available to change rates embodied in contracts; in

[33] The same attitude is evident in a number of state regulatory schemes, in which, similarly, the regulation of railroads ignores contracts while other utilities are ordered to keep their rate contracts on file. See N. Y. Public Service Law, Secs. 28, 66 (12), 80 (10), 92 (1); Wash. Rev. Code, Secs. 80.28.040, 80.28.050; Wisc. Stat., Secs. 195.08 (2), 196.19 (2).

explicit language, that Section provides that it is to apply to rate changes proposed by a gas company "in any such rate, charge, classification, or service, or in any rule, regulation, or *contract relating thereto.*" [Emphasis added.] See, also *supra*, pp. 28–29. Having recognized (but not elevated) rate contracts, Congress made appropriate additions to the filed rate provisions of Sections 4 (d) and 4 (e), as well as in Section 5 (a), which make it clear that the procedures for changing rates contained in the Interstate Commerce Act are carried over *in toto* to the Gas and Power Acts.

Mobile (Br. in Opp. in No. 17, p. 7–8) and the court below (R. 150, fn. 10) are thus in error when they say that in the Gas Act Congress adopted the suggestion referred to in the *Armour* opinion (*supra*, p. 49). What Congress did was merely to accede to the making and filing of rate contracts, but it continued the procedure of the Commerce Act of permitting the company to propose rate changes under the filed rate procedure even though the existing rate is embodied in a contract. As in the Commerce Act, "There is no provision excepting special contracts from the operation of the law". *Armour Packing Co.* v. *United States*, *supra*, 209 U. S. at 81. See, also, *infra*, pp. 67–68.

Had Congress desired to give contracts such a special status, it surely would have said so in terms more explicit than the simple provision for

filing "contracts", on which Mobile must rest; qualifications and limitations would have been spelled out.[34] There would probably also have been legislative commentary explaining this significant departure from the Commerce Act. Instead, Congress referred to the "usual provisions" of regulatory legislation and insisted that "nothing novel" was being done. See *supra*, pp. 44–45. Plainly, the *Armour* decision fully supports the Commission's position.

C. THE OVERWHELMING MAJORITY OF STATE UTILITY STATUTES PROVIDE A FILED RATE PROCEDURE APPLICABLE TO UTILITY-PROPOSED RATE CHANGES EVEN THOUGH THE EXISTING RATE IS EMBODIED IN A CONTRACT

The Gas and Power Acts must also be viewed against the background of state regulatory schemes. The overwhelming majority of these state statutes provide a filed rate procedure comparable to that of the Gas and Power Acts, as well as that of the Interstate Commerce Act which apparently has been the model in this area. See *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.*, 149 Ark. 502, 506; *Antioch Milling Co.* v. *Public Service Co.*, 4 Ill. 2d 200, 204–205. And this Court upon at least two occasions, as well

[34] Mobile neglects to note, for instance, that Mr. Justice Day referred only to contracts "for limited periods." 209 U. S. at 82. If Congress had intended to incorporate the suggestion that contracts should be immune from change by filing, it would have considered such time limitations. Moreover, the contract rates to which Mr. Justice Day was referring would, he thought, be "open to all." 209 U. S. at 82. That is not uniformly true under the Gas Act.

as other courts with but little dissent, have upheld the application of the filed rate procedure to utility-proposed changes in rates even though the existing rate was embodied in a contract. Although some states have introduced modifications in the filed rate procedures—modifications explicitly spelled out in statutes—Congress chose in the Gas and Power Acts to incorporate the "usual," "standardized" filed rate provisions (*supra*, pp. 44–45), rather than the deviations followed by a few states. Moreover, even in the states which substantially modify the filed rate system in their legislation, no special status is given to contract rates except in Connecticut and Washington (in part), where it has been done by specific statutory provision.

1. *The majority practice.*—(a). The regulatory statutes of more than 30 states contain a filed rate procedure the terms of which authorize a utility to put rate changes into effect without affirmative action by the regulatory agency, and do not prohibit the use of the filed rate procedure for utility-proposed changes in contract rates.[35]

[35] Ala. Code Tit. 48, Secs. 53, 54, 111, 113; Ariz. Code Ann., Sec. 69–246 (inapplicable to rate increase); Ark. Stat. Ann., Secs. 73–117, 73–217; Calif. Public Utilities Code, Secs. 454, 455, 491 (inapplicable to rate increase); Colo. Stat. Ann., c. 137, Secs. 47, 48; Del. Code Ann., Tit. 26, Secs. 151–57; Idaho Code, Sec. 61–307; Ill. Rev. Stat., c. 111⅔, Sec. 36; Iowa Code, Secs. 479.61–.69; Ky. Rev. Stat., Secs. 278.180, 278.190; Me. Rev. Stat., c. 44, Secs. 30, 35, 36; Md. Ann. Code, Art. 78, Secs. 29 (b), 30; Mass. Ann. Laws, c. 159, Secs. 19, 20; Mich. Stat. Ann., Secs. 22.29, 22.91; Mo. Stat. Ann., Secs.

Some expressly authorize, as do the Gas and Power Acts, the use of the filed rate procedure for a "change in contracts," (Ill. Rev. Stat., c. 111 2/3, Sec. 36; Mass. Ann. Laws, c. 159, Sec. 19; N. Y. Public Service Law, Secs. 66 (12), 92 (2), 80 (10); Wash Rev. Code, Sec. 80.28.060) and, in others, the procedure is expressly made applicable by the inclusion of "contracts" in the statutory definition of "rates" (Iowa Code, Secs. 479.48, 479.66; N. Car. Gen. Stat. Secs. 62–65 (f), 62–71).[36]

387.070, 387.200; N. H. Rev. Laws, c. 292, Secs. 3–8; N. J. Stat. Ann., Sec. 48:2–21; N. M. Stat., Secs. 68–6–7, 69–7–18; Nev. Comp. Laws, Sec. 6113; N. Y. Public Service Law, Secs. 29, 66 (12), 92 (2), 80 (10); N. C. Gen. Stat., Secs. 62–71, 62–72, 62–125, 62–126; N. D. Rev. Code, Secs. 49–0505, 49–0506; Ore. Comp. Laws Ann., Secs. 112–429, 112–4,134, 112–4,135, 113–112, 113–116; Pa. Stat. Ann., Tit. 66, Sec. 1148; R. I. Gen. Laws, c. 122, Sec. 45; S. C. Code, Secs. 58–114, 58–115, 58–402, 58–404; S. D. Code, Secs. 52.0212, 52.0217 (inapplicable to rate increase); Tenn. Code, Sec. 5451 (d); Vt. Stat., Secs. 9375, 9376, 9613, 9615; Va. Code, Secs. 56–237, 56–238, 56–240; Wash. Rev. Code, Secs. 80.04.130, 80.28.060, 81.04.130; W. Va. Code, Sec. 2556; Wisc. Stat., Secs. 195.08 (7, 9), 196.20.

[36] While many of these statutes authorize suspension of the proposed rate pending a hearing as to reasonableness, there are numerous parallels to Section 4 (e)'s prohibition against suspension of rates for industrial resales. New Jersey, Oregon and Vermont authorize suspension only when the proposed change in the schedules is for an increase in rates. N. J. Stat. Ann. 48:2–21 (d); Ore. Comp. Laws Ann., Secs. 4,134, 4,135; Vt. Stat., Secs. 9375, 9376. In Oregon, it has been accordingly held that there was no authority to suspend a proposed reduction in rates. *Union Pac. R. R. Co.* v. *Bean*, 167 Ore. 535. In New York, before Laws 1921, c. 134, Sec. 42, changes filed by gas companies and other public service companies could not be suspended, although changes proposed by

(b). Where, under these statutes, the purchaser has sought to urge, as Mobile does here, that the filed rate procedure may not be invoked by the utility to effectuate a change in the rate fixed by the contract, the courts, with limited exceptions,[37] have uniformly rejected the contention and held that the procedure applied to such rate changes. *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.*, 149 Ark. 502; *City of Lamar* v. *Town of Wiley*, 80 Colo. 18, 20; *Denver & South Platte Ry. Co.* v. *City of Englewood*, 62 Colo. 229, writ of error dismissed, 248 U. S. 294; *Kansas City Light & Power Co.* v. *Midland Realty Corp.*, 338 Mo. 1141, affirmed, 300 U. S. 109; *N. J. Suburban Water Co.* v. *Town of Harrison*, 120 N. J. L. 546, reversed on other grounds, 122 N. J. L. 189;[38] *Public Service Commission* v.

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railroads could be. *Pub. Serv. Comm.* v. *Iroquois Natural Gas Co.*, 184 App. Div. 285, 286–87, affirmed, 226 N. Y. 580. In some states the opposite is true. There is no provision for suspending proposed changes by carriers while other utilities' filings can be suspended. Ala. Code, Tit. 48, Secs. 53, 54, 113; N. Mex. Stat. 68–6–7, 69–7–18. In Maine, a proposed change in rates may be suspended except that, where filed by a railroad, it may not be suspended unless it is related to a tariff filed before the Interstate Commerce Commission and the ICC has suspended the latter tariff. Maine Rev. Stat. c. 44, Secs. 35, 36.

[37] The exceptions are: *Commonwealth of Virginia ex rel. Page Milling Co.* v. *Shenandoah Light & Power Corp.*, 135 Va. 47, and *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (D. R. I.). These two cases are discussed *infra*, p. 80, fn. 52.

[38] *N. J. Suburban Water Co.* was reversed on the ground that the utility was estopped from claiming that the paper which had been filed served as a schedule of increased rates.

Pavilion Natural Gas Co., 232 N. Y. 146; *Town of North Hempstead* v. *Public Service Corporation*, 231 N. Y. 447; *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243; *Duquesne Light Co.* v. *Public Service Commission*, 273 Pa. 287; *North Coast Power Co.* v. *Public Service Commission*, 114 Wash. 102; *Minneapolis, St. P. & S. S. M. R. Co.* v. *Menasha W. W. Co.*, 159 Wis. 130, affirmed, 245 U. S. 633. There has been recognition of this principle in *dicta* in still other cases. See *Rugg* v. *Davis*, 320 Mass. 388; *Interborough Rapid Transit Co.* v. *Gilchrist*, 26 F. 2d 912, 919 (S. D. N. Y.), reversed on other grounds, 279 U. S. 159.

In each of these cases, the utility filed rates which were higher than rates previously fixed by contract and which went into effect because not suspended by the commission or because, as in the New York cases, there was no power in the commission to suspend. The purchasers complained, as does Mobile here, that since the existing rate was embodied in a contract, increases could not be made under the filed rate procedure but rather only after a determination by the regulatory agency that the existing contract rates were unreasonable. In rejecting these contentions, the Supreme Court of Pennsylvania in *Suburban Water Co.* v. *Oakmont Borough*, *supra*, after describing the filed rate procedure in terms

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The Court of Errors and Appeals assumed, however, that if it had been such a schedule, it would have been effective to supplant the contract rate, as held by the lower New Jersey court. See 122 N. J. L. at 190–91.

comparable to the Gas Act procedure (268 Pa. at 247–248), pointed out that "the rate is at all times subject to the determination of the commission that it is just and reasonable, and it may be changed by the utility in the manner prescribed by law" (268 Pa. at 248–249), and stated (268 Pa. 248, 250):

> * * * [W]hether the complaint is filed before or after the thirty-day period, if the utility has complied with the provisions of the statute, the rates become effective "at the time [fixed by the schedule in its notice of publication] when the proposed change will go into effect"; the effective date is the date made by the company when the proposed change of rates shall apply to its service, after being duly promulgated according to the statute. A rate becomes, on the effective date, an effective rate, and, as such, it is a collectible rate, or one that may be sued for.
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> * * * * * *
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> * * * It is the effective, collectible and suable rate, duly published as required by the act, and remains as such, governing the charges to be made pending the investigation until the commission "shall determine and prescribe by a specific order the maximum, just, due, equal and reasonable rate * * * to be *thereafter established, demanded, exacted, charged or collected.*"

And, again, in *Duquesne Light Co.* v. *Public Service Commission, supra,* the Pennsylvania court

> * * * The changes made materially altered the rates to him and to all other consumers; but, as to the contracts on which appellants base their complaint, only changed the tariff rates specified therein in exactly the way the law provided they could be changed.

Similarly, in *Public Service Commission* v. *Pavilion Natural Gas Co., supra,* where the contract relied on antedated the enactment of the regulatory statute, the New York Court of Appeals ruled (232 N. Y. at 150–151):

> This provision of the statute was in force when certain of the towns and villages gave their consent to the defendant to maintain and operate its gas mains within the municipalities. This court has held, as to similar consents (*Town of North Hempstead* v. *Public Service Corp. of L. I.*, 231 N. Y. 447) that by implication the statute became a part of the terms of the consent, and that a gas company on complying with the statute was empowered to abrogate the rates stipulated in the franchises or agreements, and to put into operation a new schedule of just and reasonable rates and charges. The right, therefore, of the gas company to file a schedule increasing the rates as to all franchises and agreements given or entered into subsequent to the time when subdivision 12 became effective has been settled and determined by this court. The right, however, to increase rates specified in franchises and agree-

ments made prior to that time was not passed upon in the *North Hempstead* case. That question is now presented, since some of the franchises or agreements here under consideration were made or entered into prior to the time the statute, in its present form, took effect. It is argued that as to them there is no power on the part of a gas company to increase its rates. But I am of the opinion that the same rule applied to them. There was implied in all of such franchises or agreements, and coupled with the terms thereof, a provision that the legislature, in the exercise of its powers, might thereafter, either itself, or acting through another, regulate the rates thus fixed, and increase or lower them. There is nothing in the statute to indicate that the right of a gas company, of its own motion, to file a schedule of rates is to apply only to franchises or agreements as to rates thereafter entered into. The reason which induced this court to hold that a gas company might increase its rates as to agreements or franchises granted after the amendment of 1910 applies equally to those theretofore granted. So that under the statute as it now stands, a gas company has the legal right to increase its rates and made the increase effective thirty days after filing with the commission its schedule of new rates. If complaint be filed with the commission against the proposed increase, or if the commission itself sees fit to act without a complaint, then a hear-

> ing may be had before the public service commission as to the propriety of the proposed increase. At the conclusion of such proceeding the commission is clothed with power, if the new rate be found excessive, to annul or modify it according as the facts developed justify. * * *.

As summarized by the Arkansas Supreme Court more than thirty years ago, in *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.*, *supra*, 149 Ark. at 506–507:

> * * * Nor does the statute require an affirmative order of the commission authorizing that the new rates be put into effect. The rates become effective upon the maturity of the period of thirty days specified in the schedule, unless there is an order of the commission suspending the rates pending a hearing.
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> * * * * *
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> We are of the opinion, therefore, that the schedule of increased rates promulgated by appellant was valid, and, the statute having been complied with, the new rates superseded any contractual rates theretofore established between the parties. There could be no valid contract as against the power of public control by the commission. It would not constitute an impairment of the obligation of the contract for the new rates to be put into effect under the control of the Commission.[39]

[39] See also *supra*, p. 25, fn. 13.

(c). Two of the state cases arising under filed rate procedures came before this Court. In both, this Court recognized the propriety of using such procedures to change contract rates. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109, affirming 338 Mo. 1141; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.*, 245 U. S. 633, affirming 159 Wisc. 130.

In *Midland*, plaintiff (the utility) and defendant (the realty company) had contracted for the furnishing of steam at specific rates. In June 1917, plaintiff filed a schedule increasing the applicable rates which then went into effect. Upon subsequent complaint of customers of the utility other than defendant, the state commission found the filed rates unreasonable and fixed just and reasonable rates effective March 1918, which were higher than the contract rates and lower than the filed rates. Defendant refused to pay the filed rate before March 1918 or the rate fixed by the commission thereafter. It contended that the contract rates could not be altered except upon an express finding of unreasonableness. The Missouri Supreme Court found that both the filed rate (before March 1918) and the rate fixed by the commission (after March 1918) had to be paid, holding that "the filing by plaintiff of the rates effective August 1, 1917, primarily fixed by plaintiff's schedule were in the circumstances the effective rates *pro tempore*, though their reason-

ableness was not thereby finally determined." 338 Mo. at 1147. Distinguishing *Wichita Railroad and Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, on which the court below relied (see *infra*, pp. 72–80), the Missouri Supreme Court stated (338 Mo. at 1130–1151):

> Under the construction our court has placed upon our statute authorizing substituted rates for existing rates the statute does not require any finding of facts, or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917. As regards the commission's schedule of substituted rates of March 1, 1918, it does appear that the same rested upon an express finding of facts and orders of the commission as foundational. * * *.

In affirming, this Court rejected the defendant customers' constitutional attack and, in addition, noted (300 U. S. at 113–114):

> * * * There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties were bound by the contract. But the State has power to annul and supersede rates previously established by contract between utilities and their customers. * * * [Petitioner] here insists that the contracts could not be abrogated "without a proper hearing, finding and order of the

> commission with respect thereto." It does not, and reasonably it could not, contend that immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates. It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature.[40]

In the *Menasha* case (*supra*, p. 64), plaintiff-railroad sued to recover the rate set forth in a filed tariff. Defendant-customer relied on a prior contract specifying rates which, it claimed, could not be abrogated. The Wisconsin court held that "(w)hen the plaintiff filed its tariffs covering the freight rates for the transportation of the freight

[40] Mobile has sought to distinguish *Midland* on the ground that in Missouri all private rate contracts had been rendered unlawful, citing *State ex rel. Sedalia* v. *Pub. Serv. Comm'n*, 275 Mo. 201 (Br. in Opp. 6). But that case stands only for the familiar proposition that "no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates * * *." (275 Mo. at 212), even though the contract had been made, before the enactment of the regulatory act, by a city authorized to make it. The rule in Missouri, as elsewhere, is that contract rates may be superseded by rates made pursuant to the regulatory statute and that the state's police power can never be restricted by contract. *Kansas City Light & Power Co.* v. *Midland Realty Corp.*, 338 Mo. at 1148, 1150–51.

included in the contract, the latter became inoperative. The state had then, through the instrumentality and by the method by it prescribed, fixed another rate which became the only lawful rate till changed as provided for in the act." 159 Wisc. at 136. This Court affirmed without opinion, citing *Armour* (*supra*, pp. 49–50) and other cases under the Interstate Commerce Act. 245 U. S. 633.

Menasha, like *Armour*, concerns the regulation of railroads, and, as in *Armour*, the importance of avoiding secret contracts was stressed. 159 Wisc. at 137. In Wisconsin, as under the Interstate Commerce Act, there is no provision for the filing of railroad contracts, although contracts of other utilities are to be filed. Wisc. Stat. 195.08 (2), 196.19 (2). And it was such absence of a provision for the filing of contracts in the Interstate Commerce Act which was relied on by the court below to avoid the impact of *Armour* on the theory that when a legislature provides for filing of contracts it thereby intends to preserve the contract rates until changed by order of the commission. See *supra*, pp. 50–51. It is therefore pertinent to note that there is not the slightest suggestion in the state cases that the effect of the filed rate procedures on contracts is limited by the enactment of a provision for filing contracts. On the contrary, the decisions cited above (*supra*, pp. 58–59), upholding the effectiveness of filed rates

vis-a-vis prior contracts, in Colorado, New York, Pennsylvania, and Washington, concerned utilities whose contracts are required to be on file with the state commissions. Colo. Stat. Ann., c. 137, Sec. 16; N. Y. Pub. Serv. Law, Sec. 66 (12); Pa. Stat. Ann. Tit. 66, Secs. 1102 (22), 1142; Wash. Rev. Code, Sec. 80.28.050. And in one of these cases, the court explicitly assumed that the contract involved was on file as required by law. *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243, 247.

2. *Minority positions.*—We have just described the majority practice—legislative provision for a filed rate procedure comparable to that of the Gas and Power Acts and applying that procedure to contract rates such as Mobile's. A minority of legislatures take a different view, requiring commission approval of changes before they can become effective, but (i) only in Connecticut and Washington (in part) are contract rates treated differently from other rate forms, (ii) in all states (except Virginia and possibly Rhode Island[41]) where substantial modifications in (or departures from) the filed rate procedure have been made, the changes have been explicitly made by legislation, and (iii) in no case (so far as we have been able to discover) has a reported judicial decision done what the court below did here—excepted contract rates from a filed rate procedure comparable

[41] For cases so interpreting the Virginia and Rhode Island legislation—which on its face is comparable to that of the federal acts—see fn. 52, *infra*, p. 80.

to that in the Gas and Power Acts, while leaving other rate forms subject to that procedure.

(a). A few state statutes expressly forbid any rate change proposed by a utility, whether or not embodied in a contract, from taking effect without prior approval, concurrence, or findings as to reasonableness by the state regulatory agency. (Kan. Gen. Stat. Ann., Sec. 66–117; Montana Rev. Code, Sec. 70–113; Hawaii Rev. Laws, Sec. 4715.) And some state statutes, still without differentiating contract rates, provide the filed rate procedure in its usual form except that a filed increase in rates is made ineffective until approved or until findings are made as to its reasonableness. Ariz. Code Ann., Sec. 69–246; Calif. Pub. Util. Code, Sec. 454; S. Dakota Code, Sec. 52.0212; see Ohio Code, Sec. 4909.17.[42] This also was the law in Illinois until 1921. *Antioch Milling Co.* v. *Pub. Serv. Co.*, 4 Ill. 2d 200, 204. In Michigan and Wisconsin, the filed rate procedure applies to rates of carriers but approval is required for increases in rates proposed by other utilities. Mich. Stat. Ann., Secs. 22.13 (6a), 22.1320; 22.29 (b); Wisc. Stat., Secs. 195.08 (7), 196.20 (2).[42] Of course, to the extent that these statutes do not differentiate between

[42] Wherever commission action is required to make a change in rates effective, the absence of such approval, of course, makes any proposed change inoperative. *City of New Haven* v. *New Haven Water Co.*, 432 Conn. 496, 563; *City of Defiance* v. *Toledo Edison Co.*, 47 Ohio App. 100, 106; *Great Northern U. Co.* v. *Pub. Serv. Comm.*, 88 Mont. 180.

changes in contract rates and in other rates, they have little bearing on the construction of the Gas Act's filed rate procedure. The different procedures provided by these statutes apply equally to non-contractual and contractual rate changes.

(b). In only two states is there any differentiation made in the applicable procedure when the utility seeks to change rates embodied in private contracts. In Connecticut, the legislature has enacted as part of its statutory pattern the exception which the court below read into the Natural Gas Act. The filed rate procedure may be used by Connecticut utilities to change existing rates except where those rates are fixed pursuant to contract. Conn. Gen. Stat., Secs. 5409, 5411.[43] In such

[43] The Connecticut statute, Sec. 5411, provides in pertinent part:

"Whenever any rate of any public service company chartered by or organized under the laws of this state shall exist or shall be charged pursuant to charter, contract or any agreement or understanding, and shall be in whole or in any respect discriminatory or more or less than just, reasonable and adequate to provide properly for the public convenience, necessity and welfare, such company or any town, city or borough within which or between which and any other town, city or borough in this state, any such company is furnishing service, or any ten patrons of any such company, may bring a written petition to the commission alleging that such rate is discriminatory or more or less than just, reasonable and adequate. Thereupon the commission shall fix a time and place for a hearing upon such petition and shall mail notice thereof to the parties in interest and give due public notice thereof at least one week prior to such hearing. Upon such hearing, the commission may, if it shall find such rate to be discriminatory or more or less than just, reasonable and adequate to enable such company to

situations, "where a company desires to increase its rate schedule above that specified in a contract with any city, it could do so only by petition to the commission, a finding by it that there was ground for increased charges and an order prescribing the rates to be thereafter charged." *City of New Haven* v. *New Haven Water Co.*; 132 Conn. 496, 503. The Washington legislature has limited this express protection to those contracts which were in effect at the time its regulatory statute was enacted (Wash. Rev. Code 80.28.120), and the Washington Supreme Court has read its statute in accordance with its plain terms by holding that it does not protect subsequent contract rates from change by a new rate filing by the utility. *North Coast Power Co.* v. *Pub. Serv. Comm.*, 114 Wash. 102, 107–09; see, also *State ex rel Seattle* v. *Public Service Commission*, 76 Wash. 492."

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provide properly for the public convenience, necessity and welfare, determine and prescribe just and reasonable maximum rates or charges to be thereafter made by such company."

" In the *Seattle* case, the Washington Supreme Court stated (76 Wash. at 501):

"So it is apparent that the affirmative consent of the commission to change that rate in the manner provided by § 28 [the filed rate procedure section] was not required, though the commission had the power to suspend and adjudge such new rate unreasonable and, in that manner only, prevent it becoming effective. The provisions of § 84 lend additional support to the view that the proposed new rate of the lighting company, which was properly noticed and filed, becomes automatically effective, subject to be defeated by the commission only in the manner already indicated."

3. *The Wichita Railroad case.*—While recognizing that this Court's *Midland* decision (*supra*, pp. 64–66) lends "some support" to the Power Commission's position (R. 145), the court below chose instead to rely on *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, where the Kansas Commission, acting under Kansas law, ordered a surcharge after a hearing, without any finding of unreasonableness and despite a duly filed contract for the sale of electric power (R. 145). In a suit resting on the diversity jurisdiction of the federal courts, the Eighth Circuit upheld the state commission. On appeal, this Court, applying Kansas law, sustained the objections of the purchasing streetcar company on the basis of the interpretation of the Kansas statute adopted by the Kansas Supreme Court in *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1, to the effect (R. 146) that "rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates." 260 U. S. at 58. The Third Circuit justified its reliance here on *Wichita* on the ground that (R. 146):

> The Kansas procedure as to rates bears great similarity to the Natural Gas Act formula. Under Section 20 of that state's public utility statute a public utility may file higher rates. Section 13 of the law empowers the Commission to set aside rates

> which after hearing have been found to be unreasonable. It is under the parallel provision in the Natural Gas Act, (Section 5 (a)) that petitioner contends the Commission should have functioned in passing upon United's attempt to obtain a higher rate for its gas sold to Mobile for the industrial user Ideal. * * *

(a). This reliance, we believe, was entirely without merit.[45] We have already shown, *supra*, pp. 46–68, that the procedure accepted both by this Court (under the Interstate Commerce Act) and

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[45] The discussion in the text is also applicable to the other cases, such as *Hinkel Dry Goods Co.* v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (C. A. 10); *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1; *Railroad & Light Co.* v. *Court of Industrial Relations*, 113 Kan. 217—cited by the court below (R. 146, 149) and by Mobile (Br. in Opp. in No. 17, pp. 9–10)—which involve the same Kansas statute. *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U. S. 379, and *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232, also cited by Mobile, are easily distinguishable. The *Arkansas Natural Gas* case holds that the undoubted authority of a state to "exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts" (261 U. S. at 382) can be exerted only in the public interest and not merely to relieve a contracting party from the burdens of an improvident undertaking. 261 U. S. at 383. In the *Southern Utilities* case, where the utility sought to avoid a contract with a city on the ground that, since the legislature had power to change the rates, the contract was void for lack of mutuality, the court ruled that "the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed." 268 U. S. at 233.

by the overwhelming majority of the states under their regulatory statutes is just the opposite. Consequently, the Kansas interpretation of its statute, while permissible on constitutional grounds, represents the rate regulatory procedure of a very limited minority of states. In these circumstances, it could hardly be said that in adopting the "usual provisions * * * such as we find in all regulatory measures enacted by Congress" (81 Cong. Rec. 6722), Congress intended to incorporate into the Gas and Power Acts the Kansas procedure, different as it is from that provided in the bulk of the state statutes as well as in other federal legislation.

(b). Moreover, examination of the Kansas statute[46] involved in *Wichita* reveals that, far from bearing a great similarity to the "Natural Gas Act formula," the procedure there provided is entirely different, and the Kansas statute does not contain a filed rate procedure comparable to Sections 4 (d) and 4 (e) of the Gas Act. It contains no provision permitting rates to go into effect without commission action; Section 20, *infra*, pp. 117–118, does provide for the filing of proposed rate changes by a utility, but under that Section no proposed rate changes may be effective "without the consent of the commission". Moreover, while under Section 20 of the Kansas statute the commission may consent to the filing without holding a

[46] For the Court's convenience, the pertinent provisions of the Kansas statute are set out *infra*, pp. 113–117.

sion of rates for sales for industrial resale. See *e. g.*, Annual Reports of the Federal Power Commission for 1951, 1952, 1953, and 1954, at pp. 144, 152, 154, and 169–70, respectively.[55]

D. Mobile's position might rectify what it considers an injustice in this particular case—an inequity stemming, if it exists at all, solely from the Congressional prohibition on suspension of rates for sales for industrial resale. But its argument, if accepted, would also necessarily result in an unjustified disparity of treatment of the different forms of rates. As we have pointed out (*supra*, pp. 25–28), there are very good reasons why private contract rates should not be singled out and why all rate forms deserve the same treatment; only two states (one only in part) make the distinction in their legislation (*supra*, pp. 70–71). If it be a question of "balancing equities", there is surely no guide which enables the Court—which is not Congress—to relieve distributors who have contract rates, at the cost of discriminating against those with other kinds.

E. Another factor to be considered is the added burden, both on the Commission and the parties, of the increased number of hearings which will probably have to be held if the Commission is to

[55] There is now a bill pending before Congress, which, among other things, would eliminate the prohibition against suspension of rates for sales for resale for industrial use. S. 1880, 84th Cong., 1st Sess.

hearing (*City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 409), there is no separate provision for hearing as to the reasonableness of the proposed rate, etc.—comparable to the procedure contained in Section 4 (e) of the Gas Act—where there are objections or complaints to the proposed rate change. Instead, upon complaint, a hearing is held under Section 13, *infra*, pp. 114–115, which as the court below noted, is similar to Section 5 (a) of the Gas Act. On the basis of this hearing, the commission must determine, with adequate findings of fact, whether the existing rate is unreasonable and, if so, it must prescribe a new rate.

Under such a procedure—very different from the Gas Act's filed rate procedure (*supra*, pp. 20–22)—it is understandable how the Kansas courts could hold that the filing of a new schedule by the utility, without more, does not abrogate a prior contract and that "rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates" (95 Kan. 1, quoted in 260 U. S. at 58). Further, it is clear why this Court sustained the objection to the rate there involved, since the Kansas commission's sanctioning of a new rate was not supported by adequate findings of fact.

(c). It is as plain as can be that this Court was applying only Kansas law. See 260 U. S. at

be required to enter upon a hearing as to the reasonableness of the existing contract rate before accepting a gas company's increase for filing. It has been the Commission's practice to hold hearings only when its preliminary study of the proposed increase indicated that need; even with the number of hearings so limited, the heavy volume of rate increase proposals has resulted in a substantial delay between the filing and the Commission's final disposition of the requested increase. The many additional hearings probably required by the holding below would further increase the administrative load of the already overburdened Commission[56] and result in even more delay in Commission action on rate increases needed by the gas companies to offset constantly rising costs. This extra burden and delay should not be imposed in the absence of the best of reasons, and at any rate, it should be weighed in the balance against Mobile's claims of unfairness.

IV

THE FILED RATE PROCEDURE AS APPLIED BY THE COMMISSION HAS BEEN JUDICIALLY RECOGNIZED AND APPROVED

Apart from the instant case and *Sierra Pacific Power Co.* v. *Federal Power Commission*,

[56] The Commission's already heavy administrative burden has recently been further augmented as a result of this Court's decision in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672.

53–54, 55–59.[47] So was the Circuit Court of Appeals, when, in addition to holding that there was no constitutional objection to an order changing prior contract rates, it ruled that an express finding of unreasonableness was not required under Kansas law: 268 Fed. 37, 42, 43–44. And see fn. 50, *infra*, pp. 78–79.

Nevertheless, some point has been made that Chief Justice Taft's statement in *Wichita*, that "[t]his conclusion accords with the construction put upon similar statutes in other States" (260 U. S. at 58) means that, contrary to our view

[47] *E. g.*: "The proceeding we are considering is governed by § 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.

"* * * In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

(*supra*, pp. 56–68), the Kansas system is typical of state regulatory procedures. But it is plain from the context of the remark, as well as the cases the Chief Justice cited to support it, that he was referring only to the immediately preceding portion of the opinion holding that, where the legislature requires a full hearing and findings, an administrative order without adequate findings is void. The cases cited—*Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405[48]—did not involve or affect contract rates in any way. In *Springfield*, the issue was whether an attack on an interstate railroad's rule of distribution of cars was within the jurisdiction of the Interstate Commerce Commission or the state commission; *Baltimore & Ohio* involved the propriety of a commission order fixing rates and discussed general principles of rate-making. The only possible point in those Illinois cases to which this Court could have referred relates to the requirement of sufficient and definite administrative findings as necessary to support a commission's jurisdiction and to enable a court to review commission

[48] While no filed rate procedure was involved in these cases, it may be noted in passing that, when they were decided, Illinois law was similar to Kansas' and did not permit any increase in rate except on finding and order of the commission. The filed rate procedure was subsequently adopted in Illinois in 1921. *Antioch Milling Co.* v. *Pub. Serv. Co.*, 4 Ill. 2d 200, 203–204.

orders fixing rates and to determine the propriety of valuations found. See 281 Ill. at 411–12; 291 Ill. at 234–36.[49]

(d). That ~~this Court's~~ opinion in *Wichita* was so limited has been generally accepted. Of the more than seventy-five state and federal references to the *Wichita* decision, nearly all citations have been for the proposition that, where a statute requires a finding as a basis for administrative action, the action is invalid without it (*e. g., Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464; *Kosciusko County* v. *Pub. Serv. Commn.*, 225 Ind. 666, 675; *Central R. Co. of N. J.* v. *Dept. of Public Utilities*, 7 N. J. 247, 261),[50] or for the

[49] *Wichita* has been relied upon in Illinois for the same point which this Court in *Wichita* drew from the two Illinois cases, *i. e.*, that an administrative agency must make sufficient findings when required by statute or its order will be void (*e. g., Central Northwest Business Men's Ass'n.* v. *Illinois Commerce Commission*, 337 Ill. 149, 158; *Chicago Rys. Co.* v. *Illinois Commerce Commission*, 336 Ill. 51, 62–66) and must in other respects follow the course of action prescribed by the legislature (*Lambdin* v. *Illinois Commerce Commission*, 352 Ill. 104, 107).

[50] The Kansas Supreme Court has also accorded such a construction to *Wichita*. In *Consolidated Flour Mills Co.* v. *Kansas Gas & Electric Co.*, 119 Kans. 47, the Kansas court held that the order of the commission involved in *Wichita* did effectively abrogate the rates fixed by prior contract of the utility with another customer, although the court recognized that the *Wichita* decision had found the same order void on the grounds that it did not contain an express recital that the existing rate was unreasonable. Since, however, *Wichita* was based upon a construction of the Kansas statute rather

more general principle, also enunciated in *Wichita* (260 U. S. at 58–59), that the legislature must prescribe sufficient guides for administrative action which the agency must follow—*e. g., Darweger* v. *Staats*, 267 N. Y. 290, 305; *Van Winkle* v. *Fred Meyer, Inc.*, 151 Ore. 455, 469; *Holgate Bros.* v. *Bashore*, 331 Pa. 255, 263.[51]

In view of the nature of its holding and discussion, this Court's *Wichita* opinion plainly does not apply here where, as sharply demonstrated by the Missouri Supreme Court in the *Midland* case (*supra*, pp. 64–66), the statutory requirements are so very different. 338 Mo. at 1150. Pointing out that this Court had accepted the construction given the Kansas statute by the state court (338 Mo. at 1150), the Missouri court noted, in a statement fully applicable here (*ibid*):

> Under the construction our court has placed upon our statute authorizing substituted rates for existing rates the statute

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than a constitutional issue, the state court was "constrained to act upon [its] own judgment." Accordingly, the order was held valid. A finding of unreasonableness was presumed and no express recital was required. See 119 Kans. at 48–49, 53.

[51] A number of the opinions on these points have explicitly distinguished *Wichita* on the ground that a different statute was involved and that the Kansas requirements were inapplicable. *Pacific States Co.* v. *White*, 296 U. S. 176, 186; Frankfurter, J., dissenting in *Yonkers* v. *United States*, 320 U. S. 685, 694; *Alabama Water Co.* v. *City of Attalla*, 211 Ala. 301, 305–06; *Southern Pac. Co.* v. *Railroad Commn.*, 13 Cal. 2d 89, 109–113; *Coleman* v. *Drake*, 183 Ga. 682, 687; *Valley & Siletz R. R. Co.* v. *Thomas*, 151 Ore. 80, 86.

> does not require any finding of facts, or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917. * * *

This Court's affirmance of *Midland*—particularly its explicit recognition that contract rates may, under appropriate statutory provisions, be changed by a filing and without a finding that existing rates are unreasonable (300 U. S. at 114; *supra*, pp. 65–66)—removes any possible doubt as to the inapplicability of *Wichita*.[52]

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[52] *Wichita* is cited in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 954 (C. A. 10), affirmed, 324 U. S. 581, referred to by the court below (R. 147–48). See *infra*, pp. 98–99. However, since it was with reference to a proceeding under Section 5 (a) of the Gas Act, in which a finding of unreasonableness of existing rates is a prerequisite to ordering new rates (see, *supra*, pp. 22–23), the citation is fully within the scope of *Wichita*.

In contrast, *Wichita* has been relied on in two other cases, arising in states which apparently have a filed rate procedure, as prohibiting any rate change proposed by the utility by a filing. *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (D. R. I.); *Commonwealth of Virginia ex rel. Page Milling Co.* v. *Shenandoah Light & Power Corp.*, 135 Va. 47. Only in *Attleboro* did the court deal with the difference between the Kansas statute and the local law there involved and, in that case, the court followed *Wichita* by purporting to find a Rhode Island construction akin to that adopted in Kansas. To the extent that these cases assumed that their state law was the same as that in Kansas, the decisions represent the view of a limited minority and are clearly distinguishable. But to the extent that they applied *Wichita* to restrict the filed rate procedure, their reliance upon it was misplaced. It should be noted, however, that while on their facts these two cases involve contract

III

PERMITTING THE PROPOSED INCREASED RATE TO BE IMMEDIATELY EFFECTIVE, PENDING COMMISSION DETERMINATION OF ITS REASONABLENESS, RESULTS FROM CONGRESS' DELIBERATE ALLOCATION OF THE BURDENS RESULTING FROM UNAVOIDABLE ADMINISTRATIVE LAG.

Apparently underlying the ruling below is the court's feeling that application of the filed rate procedure in this case would be inequitable because Mobile would thereby be caught in a "squeeze" between the 14.5 cent per Mcf rate proposed by United for the gas sold to Mobile for the Ideal resale and the 12 cents per Mcf Mobile received under its contract with Ideal. See *supra* p. 4. The court apparently thought that the rate set in the United-Mobile contract could be increased pursuant to a Commission determination made after hearing, despite the resulting "squeeze" on Mobile. However, it seemed to feel that in view of Section 4 (e)'s express prohibition against suspension of rates for sales for industrial resale, it would be unfair to Mobile to permit the increase to be operative during the pendency of the Commission hearing, particularly if the Commission should ultimately determine that the proposed increase was unjustified.

A. The inequity may be more apparent than real. As far as we have been able to ascertain,

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rates, the thrust of the opinion in each case indicates clearly that the result would be the same for non-contract rates.

Mobile did not make any effort to eliminate, or even alleviate, the "squeeze" by seeking an increase in its rate to Ideal either before the state regulatory agency or otherwise. In this regard, it is noteworthy that Mobile may well have been able, under state law, to minimize the "squeeze"; Alabama, the state in which the resale is made and accordingly the state which has authority to regulate the resale rate, appears to have a typical filed rate procedure, as well as a complaint, hearing, and order procedure for changing rates (Ala. Code Tit. 48, Secs. 53, 54, 57, 64), and there is nothing to indicate that Mobile could not obtain relief from its contract rates with Ideal.[53] How-

[53] While there have been no Alabama decisions on the filed rate procedure, the courts of that state, as generally, have held that contracts by a utility cannot bind the state's regulatory power and rates fixed by the commission supersede contract rates. *Alabama Water Co.* v. *City of Attalla*, 211 Ala. 301, 307-08; *Alabama Water Co.* v. *Patterson*, 24 Ala. App. 558, 561.

In the court below, respondent's contention that Ideal's contract rates could not be changed rested on the approval of the Mobile-Ideal contract by the Alabama Public Service Commission and Ala. Code, Title 48, Sec. 325 (R. 41). This provides that "Rates * * * may be established by contract between a municipality and utility for a specific term, not exceeding thirty years, but only by and with the approval of the commission to be expressed by its order" and that "Utilities may contract with each other and with persons who are not utilities in respect of * * * the sale * * * of * * * gas * * * otherwise than pursuant to established rates * * * subject, however, in all such cases, to the approval of the commission * * *." Dictum in one case does suggest that under that statute a contract with a municipality could not

ever, even if no relief were available in Alabama, elimination of such a "squeeze" would be possible under the regulatory statute in the overwhelming majority of the states. See *supra*, pp. 56–68. If the "squeeze" is not avoidable in the instant case, that "defect" stems from an Alabama deviation from the procedure generally applied, a deviation which is adopted by a limited minority of states and which should play no part in the construction of the federal statute.

B. In any case, it is significant that since, even under the theory of the court below, the Commission has the authority to order United to charge rates higher than those set in the contract, the apparent inequity is limited to the time required by the Commission to have the hearing and to make its determination based thereon. While Mobile may suffer a loss on its Ideal resales during this period, that may be offset in substantial measure by the fact that United's proposed in-

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be changed except by consent of the parties. See *Birmingham Electric Co.* v. *Alabama Public Service Comm'n*, 233 Ala. 675. However, in that case the parties had agreed to a change in rates and the issue was as to the effective date to be fixed by the Commission for the change. *Alabama Water Co.* v. *City of Attalla*, *supra*, held explicitly that, despite the statute, a municipality's contract rates could be altered and *Attalla's* doctrine has been firmly reiterated in more recent cases. E. g., *Garrett* v. *Colbert County Board of Education*, 255 Ala. 86, 92; *Oppenheim* v. *City of Florence*, 229 Ala. 50, 57. Moreover, Ideal is not a municipality and the dictum of the *Birmingham Electric* case would not apply in any event.

creases on its other sales to Mobile were suspended by the Commission for the five months authorized by Section 4 (e), and consequently even should the Commission determine that the increases requested by United were justified in full, Mobile has been relieved from paying the increased rates in the other instances during the period of suspension. See *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C. A. 4).

It is such rough balancing that Congress apparently had in mind in prohibiting the suspension of sales for resale for industrial uses. When a gas company files proposed increased rates, the Commission makes a preliminary determination whether to permit the increases to be effective without hearing or to enter upon a hearing. Should it decide upon a hearing, the problem then arises as to what rates should prevail during the pendency of the hearings. Continuance of the old rates would be inequitable to the gas company if the Commission finally concluded that the proposed increases were justified. Permitting the new rates to be effective during the administrative hearing would, however, be unfair to the purchaser if the increases are rejected. Because of the time needed to pass upon new rates, such losses constitute a "necessary incident of rate regulation" (*Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 809 (C. A. 4)). But in order to establish some equitable allocation

of these possible losses between the gas company and its purchasers, Congress provided in Section 4 (e), on the one hand, that rates for sales for resale other than for industrial use may be suspended for five months and then be effective under bond subject to refund, and, on the other hand, that rates for industrial resales should not be subject to suspension at all. Indeed, as indicated *supra*, p. 44 fn. 28, Congressman Lea, who sponsored the prohibition against suspension of rates for industrial resale, advised the House, in effect, that in most instances the burden resulting from the non-suspendibility of these rates would be passed on to the industrial consumer—because of the generally short-term nature of contracts of sale for industrial use—so that very little, if any, would be borne by the immediate purchaser (the distributing company, *e. g.*, Mobile) from the gas company.

Hope Natural Gas Co. v. *Federal Power Commission, supra,* 196 F. 2d 803 (C. A. 9), presented the other side of the coin with respect to rate suspension. There, the gas company contended that it should be permitted to apply retroactively to the beginning of the period of suspension the higher rates fixed by the Commission after a hearing on the schedule proposed by the gas company. Holding that this was clearly precluded by the Act and was not required by the constitutional guarantee against confiscatory rates, the Fourth Circuit stated (196 F. 2d at 809):

> * * * Rate making is not an exact science and losses of one period must be counterbalanced against gains of another in any fair consideration of the reasonableness of the rate making procedure.
>
> It is true, of course, that a utility is entitled to rates that are just and reasonable; but this is not to say that rates must fluctuate automatically with every change in economic conditions or that a reasonable time may not be allowed for determining the reasonableness of a proposed increase in rates before it is allowed to go into effect. Any loss sustained by a maintenance of the status quo while such determination is being made is properly considered, not as a violation of constitutional right, but as a necessary incident of rate regulation so long as the period of suspension does not "overpass the bounds of reason." * * *

In the present case, the prohibition against suspension of rates for industrial resale operates to place on Mobile the burden of loss on the Ideal resale—pending the administrative determination. However, the holding in *Hope* is not a one-way street; and any loss sustained by Mobile, like the loss sustained by the utility there, is merely "a necessary incident of rate regulation."

C. Even if it be assumed that the delays inherent in processing the heavy volume of proposed rate increases have resulted in imposing an undue burden on purchasers of natural gas for industrial resale, the defect in the Act is one

which "must be cured, if at all, by the Legislature." *Public Service Commission* v. *Iroquois Natural Gas Co.*, 184 App. Div. 285, 287, affirmed by memorandum opinion, 226 N. Y. 580;[34] see also *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, 151; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82; *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 808 (C. A. 4). The Commission, for its part, has for at least the past several years urged Congress to delete the prohibition against suspen-

[34] In the *Iroquois Natural Gas case*, which involved precisely this problem, the New York court stated (184 App. Div. at 287):

"* * * under the statutes as they now stand it is the right of the gas company to increase its rates and make the increase effective 30 days after filing with the Commission its schedule of new rates. If complaint is filed with the Commission against the proposed increase, and if the Commission itself sees fit to act without complaint, then a proceeding may be started before the Public Service Commission which will result in an investigation of the propriety of the proposed increase; the Gas Company having notice and the right to be heard, and when a decision is reached, if the new rate is found excessive, it will be annulled or modified according to the decision of the Commission, but this decision may not take place until some time after the new rates have gone into effect. * * * This is the method, and the only method, provided by statute for protecting consumers and municipalities against increases in rates by gas companies. It may be that there is a defect in the statute, and that the Public Service Commission should have power to suspend or postpone the taking effect of proposed rate increases upon complaint made, or even upon its own motion, until a proper investigation can be had. If there is such a defect, it must be cured, if at all, by the Legislature. We must take the statutes as we find them."

—— F. 2d —— (C. A. D. C.), pending on writs of certiorari, Nos. 51, 53, this Term, there have been a number of cases in the federal courts presenting issues arising in the course of the Power Commission's processing of rate changes under the filed rate procedure. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (C. A. 5); *State Corp. Comm'n of Kansas* v. *Federal Power Commission*, 206 F. 2d 690 (C. A. 8), certiorari denied, 346 U. S. 922; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (C. A. 3), certiorari dismissed, 345 U. S. 988; *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (C. A. 4); *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C. A. 4); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C. A. 5), certiorari denied, 332 U. S. 770. While some of these cases do not discuss the propriety of applying the filed rate procedure when contract rates are being superseded, the reason is not that contract rates were not involved [37] but rather that the purchasing company accepted without question the propriety of the Commission's following of that procedure. In a few cases, however, the issue has been raised and in these the courts have recognized that the procedure followed by the

[37] The Commission's files show that contract rates were being superseded by the gas company's proposed changes in those cases.

Commission was that prescribed by the Act.[38] In contrast, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 954 (C. A. 10), affirmed, 324 U. S. 581, heavily relied on below (R. 147), has no bearing on the instant problem.

A. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (C. A. 5), *supra*, involved a suit by another customer of United whose rates had been fixed by contract and were proposed to

[38] While this Court has not previously passed directly on the issue, it has commented upon it. In *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, a case arising under the Federal Power Act, Penn Water complained that the Commission's order improperly required it to continue performance of a contract illegal under the antitrust laws. In answering this complaint, the Court, after holding that the Commission imposed no such requirement (343 U. S. at 421–423), went on to state (343 U. S. at 423–424):

"If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act, as the Commission pointed out, opens up a way provided Penn Water can prove that its wishes are consistent with the public interest. Shortly after Part II of the Power Act was passed in 1935, Penn Water, as required by § 205 (c), filed with the Commission the contract here attacked and then designated by the Commission as 'Penn Water's Federal Power Commission Rate Schedule No. 1.' Section 205 (d) provides that 'no change shall be made by any public utility in any such * * * service * * * or contract relating thereto, except after thirty days' notice to the Commission and to the public.' Here instead of following the procedure for changing existing services and practices—a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own—the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order."

be increased by the schedule filed on June 24, 1953. As in the instant case, the proposed increases were suspended for five months except for the rates for industrial resales, which went into effect on July 25, 1953. 217 F. 2d at 76, n. 3; R. 76. While Tyler accepted the propriety of permitting the latter rates to become effective, it sought to enjoin United from seeking to have the suspended increases put into effect at the end of the period of suspension on the ground that, since the rates had been fixed by contract, it was a breach of contract for United to attempt to change these rates, which, according to Tyler, could be changed only by order of the Commission made after hearing and a finding that they were unreasonable.

While the Fifth Circuit indicated that the holding of the court below in this case supported its affirmance of the denial of an injunction insofar as it required resort to the Commission, not the courts, for relief (217 F. 2d at 78), it also considered Tyler's contention that its contract rates could be superseded by filed rates only after a hearing and finding of unreasonableness. On this point, it stated that Tyler's position was "in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof * * *." 217 F. 2d at 77. With respect to Tyler's contention that United's "unilateral action" in seeking increased rates constituted a breach of contract which could be enjoined, the Fifth Circuit agreed with the district judge that this was

an incorrect characterization of United's filing, stating (217 F. 2d at 78):

> * * * the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme. So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should * * * restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4 (d) and (e) of the Act make plain, the court cannot do.

The district court was, if anything, more emphatic (R. 77–79):

> It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. * * *
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> * * * * *
>
> So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable—and hence lawful—is for the determination of

the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates.

* * * United has followed the procedure prescribed by statute to secure this review, and if it files the motion which plaintiffs allege it contemplates, and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (Hope Nat. Gas Co. *v.* Fed. Power Comm., 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the Statute. Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service *shall* go into effect." [Emphasis added.] It is not for this Court to add another proviso, reading

"and where there is no private agreement or contract to the contrary."

Plainly, the reasoning in *Tyler* fully supports the Commission's position that the filed rate procedure applies to rate increases sought by a gas company even where the rate being superseded has been fixed by private contract.*

B. In *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (C. A. 3), *supra*, the gas company had filed under Section 4 (d) a schedule proposing rate increases. The Commission, without hearing, rejected the filing on the ground that part of the proposed increase was predicated on an anticipated increase in the cost of gas which had not materialized as yet. In an opinion by Judge Hastie, who dissented in the

*The court below sought to distinguish the District Court's opinion in *Tyler* principally on the ground that the proposed increase involved in *Tyler* was for domestic resale, and was therefore suspendible and suspended by the Commission under Section 4 (e) of the Act, whereas the increase here was not suspendible (R. 141, fn. 3). But the question of suspendibility *vel non* has nothing to do with the question of the applicability of the filed rate procedure. Suspendibility of certain types of proposed increases follows as a matter of course once it is determined that the filed rate procedure is applicable.

The further distinction formulated by the court below, *i.e.*, that *Tyler* did not raise "the all important question before us of whether there should be a hearing on the reasonableness of an existent unchanged approved contract prior to acceptance for consideration of the new rate and prior to the determination of the reasonableness of that new rate" (R. 141, fn. 3), is based on a misreading of the excerpt quoted by the court.

instant case, the Third Circuit, after noting that the schedule complied with all of the Commission's formal requirements, held that the Commission had erred when it "refused to recognize as properly before it or retain for action as prescribed by statute a filing which meets all formal requirements" (202 F. 2d at 902). As we have already pointed out (*supra*, p. 35) the court continued (*id.*):

> * * * On the face of Section 4 of the Natural Gas Act * * * it is clear that, Mississippi's proposed tariff changes having been duly filed, the Commission had only two alternatives. By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. It purported to follow a third course, rejection without hearing—a course for which it cannot show even color of statutory authority.

The observation in the opinion below that "the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rate" (R. 155) cannot be reconciled with the holding in the *Mississippi* case that that procedure was one "for which it [the Commission] cannot show even color of statutory authority." The Commission cannot simultaneously accept a

new rate filing pending a hearing as to reasonableness (as it was held required to do in *Mississippi*), and reject the filing because no hearing has as yet been had (as the ruling below requires it to do).[40] See, also, *supra*, pp. 33–35, on the Commission's lack of power to reject a filing on other than formal grounds.

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[40] The court below purported to distinguish the *Mississippi* case by relying on a Commission regulation (18 C. F. R. 154.85) which requires that "agreements intended to effect a change or amendment in [an existing] contract may be made only by the execution of a form of service agreement contained in the tariff" (R. 153). According to the Court of Appeals, Mississippi's filing complied with the regulations and could not have been rejected since "there was apparently no existing filed contract" (R. 154) and, on the other hand, United's filing had not complied with the above regulation for changing contracts and hence must be rejected. But this distinction is based on an erroneous assumption of fact and an erroneous reading of the regulation.

First, the court assumed that the existing rates in the *Mississippi* case were not contract rates. However, its own records in that case show that Mississippi's rates had originally been fixed by contract and that Mississippi proposed to change them by filing a schedule without the purchaser's assent. See *Mississippi River Fuel Corp.* v. *Federal Power Commission*, *supra*, C. A. 3, No. 10868, Jt. App. 4a, 7a.

Second, the above-quoted regulation plainly prescribes only the form of *agreed-upon* changes in contract rates and does not limit the effectiveness of changes filed by the natural gas company alone. As already noted, *supra*, pp. 37–38, rates are on file in tariff form and the company's executed contracts, filed separately, must correspond with forms of service agreements filed with the tariff. 18 C. F. R. 154.40–.41. It is to maintain this conformity that the regulations require that *agreements* which change an existing contract must be in the form of a newly executed service agreement and shall

C. In contrast, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (C. A. 10), affirmed, 324 U. S. 581, relied on by the Court of Appeals below, is irrelevant. The court rested upon an excerpt from that decision to the effect that "[t]he passage of the Act did not automatically overthrow the contracts into which these companies had previously entered * * *. Such rates and charges could be modified only after an express finding of unreasonableness * * *. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand" (R. 147–48).

However, when read in context, the quoted excerpt has no bearing on the instant problem. In making that statement, the Tenth Circuit did not have before it a case in which the gas company had sought a rate change under the filed rate procedure. On the contrary, in that case the Commission had ordered the contract rates reduced after a hearing held under Section 5 (a) and entered upon by the Commission on its own motion and on complaints of interested states and

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not contain any supplements. 18 C. F. R. 154.63 (b) (5); 18 C. F. R. 154.85. United's filing on June 24, 1953, was not an *agreement* and hence did not have to comply with those provisions, but rather with the formal requirements for filing of *schedules*. 18 C. F. R. 154.63 (R. 3). The regulations clearly recognize that such a schedule may supersede contract rates, *supra*, pp. 38, 39.

state commissions. And the quoted excerpt was made with reference to the necessity of substantial evidence being developed at the hearing to support the Commission's order. Consequently, while the Tenth Circuit properly stated the substantial evidence rule and the necessity of findings, it did not purport to be passing, or expressing an opinion, on the applicability or scope of the filed rate procedure provided in Sections 4 (d) and 4 (e) of the Act.[81] As to these, there was no issue before the Tenth Circuit.[82]

[81] This Court's opinion in *Colorado Interstate* did refer to Section 4 (e) but only to reject the contention that rates for sales for industrial resales are not subject to Commission jurisdiction. 324 U. S. 581, at 596.

[82] *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, cited in *Colorado Interstate* and heavily relied upon by the court below, is discussed in detail *supra*, pp. 72–80.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1955.

APPENDIX

1. The Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et seq.*, provides in pertinent part:

SECTION 4. * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect [June 21, 1938]) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without

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requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall

go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same

by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

2. The Federal Power Act, 49 Stat. 838, 847, 16 U. S. C. 824, *et seq.*, provides in pertinent part:

SEC. 205. * * *

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new

schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(c) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in

case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. * * *

3. Sections 6, 13 and 15 of the Interstate Commerce Act, 49 U. S. C. 6, 13, 15, provide in pertinent part:

SEC. 6 (1) *Schedule of rates, fares and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which

in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *

(3) *Change in rates, fares, etc.; notice required; simplification of schedules.* No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed

if, in its judgment, not inconsistent with the public interest.

SEC. 13. (1). *Complaint to commission of violation of law by carrier; reparation; investigation.* Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

13 (2) *Complaints by State commission; inquiry on commission's own motion; expenses of State commissions.* Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad com-

missioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. * * *

* * * * *

SEC. 15 (1) *Commission empowered to determine and prescribe rates, classifications, etc.* Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded,

charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(7) *Commission to determine lawfulness of new rates; suspension; refunds.* Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any

new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule, and defer the use of such rate, fare, charge, classification, regulation, or practice but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such

amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

4. The Kansas statute, Kans. Sess. Laws 1911, c. 238, involved in *Wichita R. R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, provided in pertinent part:[1]

> SEC. 11. Every public utility and every common carrier doing business in Kansas, over which the Public Utilities Commission have control, shall publish and file with the Public Utilities Commission copies of all schedules of rates, joint rates, tolls, fares, charges, classifications and divisions of rates affecting Kansas traffic, either state or interstate, and shall furnish said commission with copies of all rules, regulations

[1] These provisions are at present codified in Kans. Gen. Stat. Ann. Secs. 66-108, 66-110, 66-111, 66-113, 66-117 (1949 ed.). The Kansas regulatory body is designated therein as the "state corporation commission," pursuant to Kans. Sess. Laws 1933, c. 275, sec. 3; Kans. Gen. Stat. Ann. Sec. 74-602.

and contracts between common carriers or public utilities pertaining to any and all services to be rendered by such public utility or common carrier. The Public Utilities Commission shall have power to prescribe reasonable rules and regulations regarding the printing and filing of all schedules, tariffs, and classifications of all rates, joint rates, tolls, fares, charges and all rules and regulations of such public utilities and common carriers.

* * * * * *

SEC. 13. It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the commission shall find that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the orders of this commission, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the

commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and reasonable. Whenever, in the judgment of the Public Utilities Commission, public necessity and convenience require, the commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions.

SEC. 14. Upon a complaint in writing made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization, or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or that any service performed or to be performed by such public utility or common carrier for

the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary. The commissioners may, upon their own motion, and without any complaint being made, proceed to make such investigation, but no order affecting such rates, joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the commission without a formal public hearing, of which due notice shall be given by the commission to such public utility or common carrier or to such complainant or complainants, if any. * * *

* * * * *

SEC. 16. If upon such hearing and investigation the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the state of Kansas, the Public Utilities Commission shall have the power to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discrimi-

natory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of any of the laws of the state of Kansas, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary. * * *

* * * * * *

SEC. 20. Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules, and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

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No. 51

In the Supreme Court of the United States

October Term, 1965

FEDERAL POWER COMMISSION, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 31

FEDERAL POWER COMMISSION, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

The Court may be helped by further discussion of Mobile's claim that the Interstate Commerce Act and decisions are irrelevant to this case, and also of Mobile's attack on our position that the overwhelming majority of state regulatory schemes provide a filed rate procedure which is comparable to the Gas and Power Acts and is applied, as the Commission did here, to changes in contract rates instituted by the utility without the consent of the customer. In discussing the state cases, we will also show that, insofar as we have been able to determine, the state regulatory commissions, like the state courts, have held that

schedules filed under the filed rate procedure supersede contract rates even where the customer has not consented to the rate change. Finally, we will discuss briefly the *Wichita* case, primarily to correct Mobile's misreading of the facts of that case.

ARGUMENT

I.

THE RELEVANCE OF THE INTERSTATE COMMERCE ACT AND DECISIONS

In an attempt to distinguish *Armour Packing Company* v. *United States*, 209 U. S. 56, 82 (discussed in our main brief at pp. 49–55), Mobile seizes on the fact that the Commerce Act does not provide, as do the Gas and Power Acts, for the filing of contracts affecting or relating to rates, in addition to schedules of the rates themselves. Mobile argues that "private rate contracts are outlawed in the railroad industry" (Brief, pp. 14–15), whereas under the Gas and Power Acts it says they are given a status superior to subsequently filed rate schedules, even though the latter may be found by the Commission to be just and reasonable and not unduly discriminatory or preferential (Brief, pp. 15–20). Mobile also purports to find an inconsistency between our contention that under the Gas and Power Acts such contracts are as valid, lawful, and enforceable as utility rate contracts have always been under rate regulation, and the fact that the rates

embodied in such contracts are subject to change by the filed rate procedure (Brief, pp. 20–22):

Such a change it persists in calling "unilateral abrogation" of the contract by the utility, a semantic device on which we have previously commented (main brief, p. 32), which disregards the fact that the change is only possible with Commission acquiescence under a statutorily prescribed procedure. For the filed rate procedure does not consist merely in the recording of the change at the offices of the Commission but, as we pointed out in a portion of our main brief (pp. 20–22) overlooked by Mobile, the utility must submit as a part of its filing what is in substance a *prima facie* rate case in support of the proposed change. This is scrutinized by the Commission in the thirty-day period which the Act provides must elapse before the change can become effective, unless waived by the Commission. Since the *prima facie* case specified in the Commission's rules consists of a showing of the cost of rendering the service, the Commission is able to check many of the elements of the utility's cost study against the utility's own annually reported plant investment, depreciation reserve, operating expenses, volume of sales, revenues, and capital and other fixed charges, as well as against industry averages and averages for comparable utilities. If the *prima facie* showing is not satisfactory, a hearing is set at which "the burden of proof to show that the increased rate or charge

is just and reasonable" is upon the utility. Following the hearing, the Commission is expressly authorized to "make such orders with reference [to the proposed rate] as would be proper in a proceeding initiated after it had become effective [*i. e.*, a proceeding on complaint by others or upon the Commission's own initiative]." Section 4 (e), main brief, pp. 102–103. This is far from unilateral action by one party to the contract in disregard of its contract rates; rather, in so proceeding, the gas company "followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective * * *, this would be not contrary but pursuant to the statutory scheme." *Tyler Gas Service Company* v. *United Gas Pipe Line Company,* 217 F. 2d 73, 78 (C. A. 5). The gas company is not the sole arbiter; the Commission is a direct participant and performs a responsible and controlling role. There is certainly no delegation of "legislative power to abrogate contracts to one of the parties to the contract" (Mobile brief, p. 23).

Moreover, there is no merit to the basic assumption of Mobile's attempted distinction of the *Armour* case, *i. e.*, that "private rate contracts are outlawed in the railroad industry." Such contracts are merely modified insofar as they differ from the filed or prescribed rate. This is shown by the *Armour* case itself, in the next two sentences following the portion quoted by Mobile at page 15 of its brief (209 U. S. at 82):

> The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.
>
> If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law.

See also *Interstate Commerce Commission* v. *Chicago G. W. Ry.*, 209 U. S. 108, 119; *City of Manitowoc* v. *Menitowoc & Northern Traction Co.*, 145 Wis. 13, 29–30; *Northern Pac. Ry. Co.* v. *St. Paul & Tacoma Lumber Co.*, 4 F. 2d 359, 363 (C. A. 9), appeal dismissed, 269 U. S. 535.

It is, therefore, clear that the industry differences to which we alluded (main brief, pp. 51–55) *as showing that the filing of contracts was administratively feasible for the interstate wholesale gas and electric industries while it had not been for the railroad industry,* present no basis for assuming that Congress attempted to give private rate contracts any higher status in the Gas and Power Acts than they had under the Interstate Commerce Act.[1] Cf. *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243, 247–53. Congress

[1] Mobile's attempt to attribute to Congress a different intent in enacting the provisions of Section 4 (d) and 4 (e) from the purpose of the provisions of the Interstate Commerce Act upon which they were modeled, by speculating that Congress meant to respond in a particular way to cer-

merely provided that they should have the same status as filed schedules of rates themselves. For Congress was at pains in Section 4 to provide in precisely parallel terms that both contracts and rates should be filed (Section 4 (c)) and changed (Section 4 (d)) on initiative of the utility and the changes should be scrutinized by the Commission (Section 4 (e)). Congress also used the same terms in providing in Section 5 that both contracts and rates should be subject to investigation, hearing, findings and change on complaint of others or on the initiative of the Commission. The same language which in Section 5 applies to both cannot be read as not applying to contracts in Section 4, as Mobile would have it.[2]

II

THE STATE CASES

In its analysis of the state cases cited by our main brief, Mobile has nowhere disputed that they

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tain language of Mr. Justice Day in the *Armour* opinion (Mobile brief, pp. 14–16), is not supported by a single citation to the legislative history of the Power or Gas Acts, and we are not aware of anything in that history that even looks in that direction.

[2] It is noteworthy also that Mobile is not only unable to point to any difference in the wording of Sections 4 (d) and 4 (e) of the Gas Act (and 205 (d) and 205 (e) of the Power Act) relating to contracts, from that relating to schedules of rates, but it is also unable to point to anything in the wording of the Act to support its further contention that contract rates may be changed by a filed rate schedule if the customer does not object (Mobile brief, p. 33).

are, each and every one, clear, undeniable holdings that rates filed by a utility under a filed rate procedure may supersede contract rates. See Mobile brief, pp. 51–56, 44–46. Mobile has, however, tried to transform this line of cases in Arkansas, Colorado, Missouri, New Jersey, New York, Pennsylvania, Washington, and Wisconsin into a "minority view" of two states, against which it purports to line up an "overwhelming weight of authority," consisting of six or more states to the contrary. That effort, we shall show, is wholly misleading and erroneous, and the very large majority of state decisions under filed rate procedure statutes, as well as the large number of states having such statutes, completely confirm our contention (main brief, pp. 55–80) that the filed rate procedure as administered by the Federal Power Commission is common and well recognized and, far from being in any sense "novel" or a "radical" departure from regulatory technique as the court below supposed (R. 150–152, 154) is one of the "usual provisions" of regulatory legislation which Congress intended to adopt.

A. STATE CASES CITED IN THE COMMISSION'S MAIN BRIEF

(1). Mobile attempts to discredit, by the citation of additional cases, the Colorado, New Jersey, and New York cases cited in our main brief. It seeks to dilute the effect of *City of Lamar* v. *Town of Wiley*, 80 Colo. 18, and *Denver & South Platte*

Ry. Co. v. *City of Englewood*, 61 Colo. 229, which concededly applied the filed rate procedure to supersede contract rates (Mobile brief, p. 54; see our main brief, p. 58), by relying on *Ohio & Colorado S. & R. Co.* v. *Public Utilities Commission*, 68 Colo. 137 (Mobile brief, pp. 54–55). But *Ohio & Colorado* does not bear on the Colorado law on this point; it preceded *Lamar* and the filed rate procedure was not even at issue. The Colorado court there reversed an order of the state commission granting higher rates on the ground that the evidence did not support it and stated, as quoted by Mobile (Brief, p. 54), that an order of the commission must have sufficient basis. Obviously, the case deals only with the sufficiency of an order entered after a full hearing, such as the Federal Power Commission could hold, if it thought it appropriate, under Section 4 (e) of the Gas Act, or under Section 5 (a) on complaint of the purchasing company.

Noting the reversal on other grounds of *New Jersey Suburban Water Co.* v. *Town of Harrison*, 120 N. J. L. 546 (see our main brief, p. 58), Mobile claims that *Hackensack Water Co.* v. *Board of Public Utility Commissioners*, 96 N. J. L. 184, indicates a contrary practice (Brief, p. 52). But *Hackensack* and any practice it may indicate preceded the *Suburban Water Co.* case; also, examination of *Hackensack* shows, as was noted in *Suburban Water Co.* (see 120 N. J. L. at 550–51), that it did not resolve the issue here

involved. Furthermore, while the Court of Errors and Appeals reversed in *Suburban Water Co.* on the ground that the utility was estopped from asserting that it had filed a "schedule of increased rates" (122 N. J. L. at 190, 194), the court recognized that such a schedule would be "automatically effective" (122 N. J. L. at 194), *i. e.*, "effective, by the mere act of filing, until suspended, changed, or altered by the board pending the determination of the ultimate question of whether the rates so promulgated were 'just and reasonable'" (122 N. J. L. at 191). See our main brief, pp. 58–59, n. 38.

Likewise, the New York cases (*Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, and *Town of North Hempstead* v. *Public Service Corporation*, 231 N. Y. 447) are in accord with the Commission's reading. See main brief, pages 61–63. Contrary to Mobile's statement, the New York Court of Appeals did not subsequently "refuse to follow those cases" in *Matter of Drif Dock, E. B. & B. R. R. Co.*, 254 N. Y. 305 (Mobile brief, p. 53). In the latter case the court, far from departing from the *Hempstead* and *Pavilion* decisions, recognized them as its "construction of the legislative intent as embodied in the Public Service Commissions law" (254 N. Y. at 315). The New York court held that they did not control in the case then before it only because the problem involved was an entirely different one, not subject to the ordinary

regulatory provisions (254 N. Y. at 314–16); for in contrast to the *Hempstead* and *Pavilion* situations, where the rates had been established by contracts between the utility and the purchaser, maximum rates in *Dry Dock* had been fixed in a statute by the state legislature itself. Consequently, since this maximum rate was the result of a direct legislative command, it could not be exceeded except by a subsequent act of the legislature or by the affirmative act of the administrative body, the Public Service Commission, to which the legislature had delegated its authority. Only in this special situation was New York's filed rate procedure ineffective to change previously existing rates. 254 N. Y. at 313–16.[3]

(2). Mobile's second distinction of the Commission's cases—that Arkansas and Wisconsin have Commerce Act-type statutes—also does not advance its position. On the basis of a statement in *Harrison Electric Co.* v. *Citizens' Ice and Storage Co.*, 149 Ark. 502 (see main brief, p. 63), that the Arkansas statute "is patterned, to a considerable extent, after the Federal statute creating the Interstate Commerce Commission" (149 Ark. at 506), Mobile seeks to dismiss the case as governed by its own Commerce Act discussion

[3] The application of the filed rate procedure of the New York statute, involved in the *Hempstead* and *Pavilion* cases, to situations involving contract rates was followed in 1951 in *Childs* v. *Brooklyn Edison Co.*, 105 N. Y. S. 2d 503, 507–08 (Sup. Ct.).

(Mobile brief, p. 31). The fact is, however, that the court's statement is authority for our position, since it points up the circumstance which we have stressed in our main brief (pp. 44–45, 55–57), *i. e.*, that the array of state statutes and the Interstate Commerce Act's analogous filed rate procedures are related and together they represent the "usual regulatory measures" which Congress had in mind in enacting the Gas and Power Acts. The Gas and Power Acts, too, are "patterned, to a considerable extent, after the Federal statute creating the Interstate Commerce Commission." See, also, *supra*, pp. 2–6.

Minneapolis, St. Paul & S. S. M. R. Co. v. *Menasha W. W. Co.*, 159 Wisc. 130, affirmed, 245 U. S. 633, where the filed rate procedure was applied to an increase of a railroad's contract rates (see main brief, pp. 66–68), also supports our position despite Mobile's effort to distinguish it. In Wisconsin, as we noted in our main brief (p. 69), increases in the rates of utilities other than railroads are expressly excluded from the filed rate procedure and can be made only after hearing and order. But this does not mean, as Mobile argues (Brief, pp. 51–52) that "as the Solicitor General concedes, Wisconsin draws a sharp distinction between the regulation of carriers and other utilities, just as Congress did: 'approval is required for increases in rates proposed by other utilities' (C. Br. 69)." In the first place, the Wisconsin distinction between rates of railroads

and rates of other utilities is expressly embodied in the statute governing the latter's rates;[4] in contrast, Congress made no such distinction between the regulation of rates in the Commerce Act and in the Power and Gas Acts. Secondly, Wisconsin's legislature did not draw a distinction between contract rates and other rates as Mobile contends should be done here. In that state, the availability of the filed rate procedure to change rates depends only on the industry involved and upon the change desired; it never depends on the existence *vel non* of a contract. But Mobile's whole case depends on a judicial separation of contract rates from all others, under a statute which makes no such distinction in its terms.

(3). Nor is there any merit to Mobile's claim that Missouri and Washington have unusual constitutional and statutory provisions which make the cases from those courts irrelevant. Although Mobile's attempt to distinguish *Kansas City Light & Power Co. v. Midland Realty Co.*, 338 Mo. 1141, affirmed, 300 U. S. 109, on the ground that a Missouri constitutional provision made all contracts unlawful (Mobile brief, p. 45), has already been discussed in our main brief, p. 66, n. 40, we may add (1) that this Court's opinion was ex-

[4] Wisconsin Stat. Sec. 196.20 (2), dealing with utilities other than railroads, provides:

"No change in schedules which constitutes an increase in rates to consumers shall be made except by order of the commission, after an investigation and hearing."

pressly grounded on the assumption that the rate contracts were valid (300 U. S. at 113), (2) that the Missouri Supreme Court's opinion indicates that the contracts continued in existence until the changed rates were filed (338 Mo. at 1147–49) and that the effect of the schedule filed by the utility was determined solely on the basis of the filed rate procedure and without reference to the Missouri Constitution (338 Mo. at 1145–47).

Moreover, the constitutional provision, that "The exercise of the police power of the State shall never be infringed" (275 Mo. at 209), which Mobile asserts is unusual, had been brought into issue in two previous cases, relied upon by Mobile, solely because municipal contracts were there involved. *State ex rel. Sedalia* v. *Public Service Commission*, 275 Mo. 201, writ of error dismissed, 251 U. S. 547; *City of Fulton* v. *Public Service Commission*, 275 Mo. 67, writ of error dismissed, 251 U. S. 546; see 338 Mo. at 1148. In rejecting the argument in these cases that contracts entered into by a city under the express authority of a state statute could not be altered by the commission (275 Mo. at 203), the court pointed out that under the State Constitution the legislature could not exempt municipal contracts from regulation. 275 Mo. at 209; 275 Mo. at 71. In so holding, the Missouri court concluded not that contracts are void but merely that they are subject to change in the manner provided in the

regulatory statute. In other words, in Missouri as elsewhere, private contracts, although valid *inter se*, cannot operate to frustrate the police power of the state. Thus, in *Sedalia* and *Fulton*, the rates, although embodied in a contract, were altered by "the order of the Public Service Commission for reasonable rates" after hearings and investigation (275 Mo. at 212, 71), and, in *Midland*, the rates, originally the subject of a private contract, were changed by schedules filed by the utility pursuant to the filed rate procedure, as authorized by the Missouri statute, 338 Mo. at 1147; 300 U. S. at 111, 114.

In *North Coast Power Co.* v. *Public Service Commission*, 114 Wash. 102, the Washington court sustained a change in contract rates under the filed rate procedure, after pointing out that under the terms of that procedure, "the affirmative consent of the commission * * * was not required" but "the proposed new rate * * * which was properly noticed and filed, becomes automatically effective, subject to be defeated by the commission only in the manner already indicated"—*i. e.*, by suspension and a finding that the new rate was unreasonable (114 Wash. at 106). On the basis of the further statement of the Washington court that an exception expressly created by the legislature for contracts existing at the time the statute was enacted did not protect subsequent contract rates from a change by

filing (114 Wash. at 107–108), Mobile seeks to urge that only because of this statutory exception did the Washington court find that subsequent contracts were not protected (Brief, pp. 52–3). But the decision leaves no doubt that the reverse was true and that the source of the operation and effect of the filed rate procedure was found in that procedure itself; the statutory exception was treated as the exception it was intended to be and not as the basis for the court's general construction of the statute.

B. STATE CASES RELIED ON BY MOBILE

In the effort to show that its position reflects the predominant state view, Mobile not only tries to discredit the cases upon which we rely, but also claims that its position is independently supported by at least six cases. Two of these (*Commonwealth of Virginia ex rel. Page Milling Co.* v. *Shenandoah Light & Power Corp.*, 135 Va. 47; *Attleboro Steam & Electric Co.* v. *Narragansett Elec. Lighting Co.*, 295 Fed. 895 (D. R. I.)), have already been discussed in our main brief (at p. 80, fn. 52; see, also, p. 68), where we show that in these cases the courts' erroneous reliance upon *Wichita* stemmed in part from their failure to distinguish the filed rate statutes before them from the Kansas statute. In *Attleboro*, the District Court noticed the difference but incorrectly believed that the Rhode Island courts had con-

strued their statute to be the same as Kansas' (295 Fed. at 900–903).[7]

Examination of the other four cases shows that none of them lives up to Mobile's representations.[8] The first, *Birmingham Electric Co.* v. *Alabama Public Service Commission*, 233 Ala. 675 (Mobile brief, p. 51, has already been discussed in our main brief, pp. 82–83, n. 53. Not only does this case deal with an agreed change in *municipal* contract rates which are subject to special provisions in Alabama, but also Mobile's reading (Brief, p. 51) is clearly contradicted by the other

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[7] *Attleboro* relied for this conclusion as to Rhode Island law upon *Rivelli* v. *Providence Gas Co.*, 44 R. I. 76. There the utility filed increased rates and other changes and the commission entered into a hearing on the new rates and found them just and reasonable, thus utilizing the standards of the hearing provision of the filed rate procedure, comparable to Section 4 (e) of the Gas Act and Section 205 (e) of the Power Act. The Rhode Island court affirmed the decision of the commission. *Attleboro* relied upon the court's passing description of the statute—that no change could be made by the utility except upon 30 days notice and that the commission could not fix rates (referring to the complaint, hearing and order section) except after finding that the existing rates were unreasonable (44 R. I. at 77–78)—as indicating that the filed rate procedure was limited by the commission's power under the complaint, hearing and order section. This was plainly unwarranted; and Mobile itself has not sought to rely on the *Rivelli* case.

[8] Mobile also cites as applicable *Wichita Railroad and Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, even though Kansas does not have a filed rate procedure statute. The *Wichita* case is discussed in our main brief, pp. 72–80 and *infra*, pp. 24–29.

Alabama cases before and after the *Birmingham* case (see our main brief, pp. 82–83).

In the same way, neither *Winfield* v. *Public Service Commission*, 187 Ind. 53, nor *In re Scarsport Water Co.*, 118 Me. 382 (Mobile brief, pp. 50, 51), involves an attempt to change rates under the filed rate procedure. In these cases, the Indiana and Maine courts held merely that the state commissions, after hearing, could order higher rates than those charged under municipal contracts entered into before the regulatory statute was enacted. The Indiana utility could not have invoked a filed rate procedure since none was available in that state; at that time, no change could be made in any Indiana utility rates except upon approval of the commission. Ind. Stat., Sec. 54–317. In 1953, Indiana adopted the filed rate procedure for the first time, in the statute regulating common carrier motor vehicles. Ind. Stat., Secs. 47–1227, 47–1225 (g). And under that Act, the Indiana court has held, citing cases upon which we rely here, that filed rates "become effective as a matter of law" at the end of the notice period in the absence of objection and commission action thereon. *State ex. rel. Evansville City Coach Lines* v. *Rawlings*, 229 Ind. 552, 562. While the Maine decision does contain a brief statement, quoted by Mobile (Brief, p. 50), indicating in general terms that contract rates could not be altered by a utility's filing, that

statement was irrelevant to the issue presented and even as dictum its exact meaning is unclear. It may have been made in view of a special section enacted in Maine, discovered on our further examination, which provides that contract rates which are approved by the commission "shall not be changed during the term of the contract without the consent of the commission." Me. Rev. Stat., c. 44, Sec. 40.

As for *Rutland Ry. Light & Power Co.* v. *Burditt Bros.*, 94 Vt. 421, the last case relied on by Mobile (Brief, p. 50), it is noteworthy that the case was not decided under a statute prescribing the filed rate procedure. One of the omissions indicated by asterisks in Mobile's quoted excerpts identifies the utility as a company "furnishing electric energy," and the decision is explicitly based upon another Vermont statute which provides a special procedure for certain electric companies. It was on the basis of these considerations that the Vermont court stated (94 Vt. at 422–23):

> The statute has provided the way in which rates may be changed and the manner in which it may be done. It is provided in G. L. 5689 [now at Vt. Stat. 9737 (1947)], among other things, as follows: "The charges made by a person, company or corporation for electric energy so sold and distributed, shall be reasonable; and, in case the parties do not agree as to

> the amount of such charges, the Public Service Commission shall, upon hearing and after proper notice to both, fix and determine the same, and may, upon like notice and hearing, from time to time change them." The statute provides just two ways by which the rates are fixed and changed: Either by agreement, or by the Public Service Commission upon due notice and hearing.

The quoted section is in the chapter devoted to electric companies exporting Vermont-generated hydroelectric energy[7] whereas Vermont's filed rate procedure, corresponding to the Commerce, Gas and Power Acts, is found among the general provisions covering public service companies. Vt. Stat. Secs. 9375, 9376 (1947). But see the possibly contrary *dictum* in *Jones* v. *Montpelier & Barre Light & Power Co.*, 96 Vt. 397.

III

THE STATE COMMISSIONS' VIEWS

There is no basis for Mobile's contention that the majority of state commissions support its view that contract rates cannot be altered under a filed rate procedure (Mobile brief, pp. 55–56). Mobile has ventured specific claim only to the practice of the Idaho and California commissions,

[7] Further provisions in that chapter set out specifically the procedure to be followed for invoking action on electric rates by the commission "when the parties cannot agree." G. L. 5691–92 (1917), now Vt. Stat. 9739–40 (1947).

relying upon *Caple* v. *Interstate Utilities Co.*, P. U. R. 1930A 18, and, apparently, upon the procedure followed in California regarding Sierra's rates.[8] But neither of these cases shows that special treatment is accorded to contract rates under the filed rate procedure. In both states, rather, the typical filed rate procedure is modified in that it is made inapplicable by express statute to *all* rate increases.[9] And commission action was required in the cases relied upon only because rate increases were proposed.

[8] Mobile asserted that "the established practice of the California Commission" would be shown in the brief of Sierra Pacific Power Company in No. 51, this Term (Mobile brief, p. 55). Examination of the latter brief, however, fails to reveal any showing of the California administrative practice, other than the passing description of Sierra's own experience. See Brief for Sierra Pacific Power Company in Nos. 51 and 53, pp. 8–11, 25–30. On the assumption that Mobile meant to rely *sub silentio* on the facts in No. 51, we have explained in the text the reason for the California proceedings, which were required not by the existence of contracts but by a special statute governing rate increases generally.

[9] California Public Utilities Code, Sec. 454, provides: "No public utility shall raise any rate or so alter any classification, contract, practice, or rule as to result in any increase in any rate except upon a showing before the commission and a finding by the commission that such increase is justified."

Idaho Code, Sec. 61–622, provides: "No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified."

We have noted previously that California was one of the states which, without differentiating contract rates, excluded

Mobile further asserts, without reference to supporting authorities, that "it is a reasonable assumption" that a majority of other state commissions agree with its position and it suggests this alleged practice as a reason for the absence of other judicial decisions (Mobile brief, pp. 55–56). On the contrary, as we have shown, it is clearly established by judicial decisions in eight states that contract rates are subject to the filed rate procedure. See *supra*, pp. 7–15; main brief, pp. 58–68. A diligent search of the available published state commission reports has disclosed the additional concurring views of the New Mexico Commission and the General Counsel of the Maryland Commission. And inquiries made by us since receipt of Mobile's brief reveal still more commissions interpreting their filed rate procedures as does the Commission here, and none holding to the contrary.

In its recent decision in *Matter of Southern Union Gas Co.*, Case No. 418, January 26, 1955, the New Mexico Public Service Commission discussed this issue at length, including authorities relied upon here by Mobile and the Commission, and definitely rejected the contention that rates fixed by contract could not be changed by the utility's filing of new schedules under the filed rate

increases in rates from the filed rate procedure. See main brief, p. 69, p. 56, n. 35; Commission's brief in No. 51, p. 36, n. 31. This same feature of the Idaho statute was inadvertently overlooked in preparing our main brief. See main brief, p. 56, n. 35.

procedure. There the New Mexico Commission, by interlocutory order, permitted the new rates to take effect before the expiration of thirty days' notice and pending the hearing into the reasonableness of the proposed rates. The final order, which found the new rate just and reasonable, explicitly upheld the use of the filed rate procedure *vis-a-vis* existing contract rates and the collection of the new filed rates during the pendency of the proceeding.[10]

In addition, the General Counsel of the Maryland Public Service Commission has consistently construed that state's filed rate statute to be applicable regardless of the existence of a contract. *Matter of West Arlington Realty Co. and Artesian Water Co.*, 12 Md. Pub. Serv. Comm. Rep. 335; *Matter of Road Directors of Allegany County and C. & P. Tel. Co.*, 11 Md. Pub. Serv. Comm. Rep. 326; *Matter of Hagerstown & Frederick Railway Co.*, 9 Md. Pub. Serv. Comm. Rep. 442.[11]

Finally, in a further effort to unearth the facts of the practice followed by the state agencies, we obtained informal advice from the commissions in most of those states, having filed rate procedures, in which no dispositive reported decisions

[10] Review of the decision of the New Mexico Commission in the *Southern Union Gas Company* case is now pending before the New Mexico Supreme Court.

[11] The General Counsel of the Maryland Public Service Commission has adhered to this position notwithstanding contrary dictum, prior to *Road Directors* and *West Arlington*, in *Public Service Commission* v. *C. G. E. L. & P. Co.*, 9 Md Pub. Serv. Comm. Rep. 297.

had been found. Referring to the pending review of the Power Commission's filed rate practice in *Sierra* and here, we requested information concerning the state commissions' decisions, regulations or rulings under their filed rate procedure. We set forth our contention that under the Power and Gas Acts a filed rate schedule will become effective and change a previously existing rate, unless the Commission takes adverse action, even where the customer has a long term contract at the existing rate and objects to the change. We also pointed out that Mobile urges that state commissions have not administered their statutes in this way, as an explanation for the dearth of judicial decisions.

Responses received from four states indicate that the issue has never been presented there (Arizona, Delaware, South Carolina, West Virginia).[12] The responses from Massachusetts, North Dakota, and Idaho expressly state that the filed rate procedure applies regardless of existing contracts, except that in Idaho, as already noted, increases in

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[12] The response from West Virginia states that the effect of the statute upon contracts has not arisen there because rates in that jurisdiction are not made by contract. Another possible reason for the absence of this question is that under some state statutes, unlike the Power and Gas Acts, a utility has an alternative to invoking the filed rate procedure since it is expressly authorized to file complaints directed to its own rates. See main brief, pp. 22-23. The response from South Carolina indicated that the filed rate procedure had been invoked once, a few years ago, and no controversy arose with respect to it.

rates are excluded from this procedure by statute. See *supra*, p. 20 and n. 9. Responses from seven other states express general agreement with our interpretation of the filed rate procedure set forth in our communication, or indicate the view that their states' procedures are comparable to the procedure followed by the Commission in the instant case and in *Sierra* (Iowa, Kentucky, Michigan, North Carolina, Oregon, South Dakota, Tennessee). No communication received has indicated that any of the commissions, in the various states where reported decisions are lacking, follows the practice espoused by Mobile. Thus, all efforts to measure Mobile's "assumption" as to state practice against the actual facts lead to the conclusion that the analogous state statutes are generally applied just as the Commission has applied the Power and Gas Acts.

IV

FURTHER DISCUSSION OF THE WICHITA CASE

In presenting *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, as square support for its position, Mobile has incorrectly stated the facts of that case. Asserting that the Kansas commission issued its order of April 1, 1918 "without having held a hearing" (Brief, p. 37), Mobile characterizes the issue in *Wichita* as whether "the contract rate had been effectively increased by the mere filing" (Brief,

p. 38), and urges that *Wichita* "squarely presented and rejected" the proposition involved in the instant case, *i. e.*, that "a filed rate embodied in the contract may be changed by the mere filing of a proposed schedule of increased rates" (Brief, p. 35).

Contrary to Mobile's statement, it is clear that the Kansas commission ordered the surcharge only "after hearing the evidence." 268 Fed. at 39; 260 U. S. at 51. The facts that a hearing was had and *Wichita* participated therein were explicitly alleged by *Wichita* in its complaint (No. 27, Oct. Term 1922, R. 3). Moreover, the surcharge ordered by the Kansas commission significantly put into effect rates which, while higher than the contract rates, were lower than the rates requested by the utility in its petition. 268 Fed. at 39–40; 260 U. S. at 51. Thus, the contract rates were not affected by a "mere filing," but rather by an order made after hearing and based on the Kansas commission's own conclusion as to reasonable rates.

Wichita's contention in the action (apart from numerous others) was that the commission's order failed to contain findings of fact to support it. The Eighth Circuit upheld the order on the ground that the statute did not require findings and that, since the commission's order was *prima facie* reasonable, the presumption is that there was substantial evidence to support it (268 Fed. at 43–44. In reversing, this Court held that,

since there had been no finding of reasonableness or unreasonableness, the presumption relied upon by the Eighth Circuit did not obtain (260 U. S. at 57). The Court then concluded that "a valid order of the Commission under the [Kansas] act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void" (260 U. S. at 58).

It is thus evident that the issue before this Court in *Wichita* was neither the effect of a "mere filing" under a filed rate system nor whether the reasonableness of *existing* or *new* rates was to be investigated. What this Court decided was that, assuming that Kansas law required a finding, the absence of the finding made the order void under general administrative law principles. The burden of *Wichita's* successful argument to this Court was addressed to this very point and asserted that in order for the commission to exercise its powers and jurisdiction under the Kansas Act, it had to make findings sufficient to bring the case within its jurisdiction—*i. e.*, reasonableness or unreasonableness of rates, discrimination, etc. Brief for Appellant in No. 27, Oct. Term, 1922, pp. 21–50; see also our main brief, at pp. 76–80.

That the finding referred to in *Wichita* (260 U. S. at 57–58) related to the reasonableness of the existing rate, rather than of the proposed rate, was not at issue there and was due to a peculiarity of Kansas law. As pointed out in our main brief

(pp. 74–75), Kansas has no filed rate procedure comparable to the Power and Gas Acts. No proposed change in rate filed by a utility is effective without consent of the Kansas commission and the only provision for hearing is one with reference to existing rates, corresponding to Sections 5 (a) of the Gas Act and 206 (a) of the Power Act. The commission's order in *Wichita* was entered after hearing and since it fixed different rates from those requested by the utility, it clearly was not a "consent" to the utility's filing (see Brief for Appellant in No. 27, October Term, 1922, p. 55). This Court pointed out in *Wichita* that since the proceeding there involved had been "upon pleadings and *inter partes*," it was evident that the "consent" provision of Kansas law did not control (260 U. S. at 57); the proceeding was considered to be governed by the only hearing and order provision found in Kansas law (260 U. S. at 58). The Court believed that the latter section required express findings, thus disposing of the only issue before it.[13]

In sum, we reiterate what we have already said in our main brief—that *Wichita* does not represent a holding on the problem of this case. However, in other decisions, as we have also shown,

[13] This Court's construction of the Kansas complaint, hearing and order section was promptly rejected by the Kansas Supreme Court, which held that express findings were not required and that the same commission order involved in *Wichita* was valid and effectively abrogated contract rates. See main brief, pp. 78–79, n. 50.

this Court has passed on the propriety of changing contract rates by a "mere filing" of schedules under a filed rate procedure analogous to the Power and Gas Acts and has expressly approved it. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.*, 245 U. S. 633; *Armour Packing Co.* v. *United States*, 209 U. S. 56; see main brief, pp. 49 ff., 64–68: Indeed, in *Midland*, the appellant vainly advanced *Wichita* as a holding on the filed rate procedure, in language remarkably parallel to Mobile's,[14] and this Court plainly regarded *Wichita* as immaterial; the opinion in *Midland* does not even mention or cite *Wichita*. In the same way, we believe that

[14] Appellant, in *Midland*, advanced *Wichita* (and other cases relied upon by Mobile) as authority "That the mere enactment of that statute [Missouri Public Service Commission Law] or the mere filing, thereunder, of a schedule of rates, for customers, generally, could not have the effect of abrogating appellant's contract, in the absence of any finding or order of the commission, upon an orderly hearing, with respect to the filed schedule or with respect to the contract * * *". Brief for Appellant in No. 217, Oct. Term, 1936, pp. 17, 19; see Mobile br., pp. 34–35, 37–38. It relied on the discussion in *Wichita* of Section 20 of the Kansas Act. Brief for Appellant in No. 217, October Term, 1936, pp. 18–19; see Mobile br., p. 38. And it contended that the Kansas and Missouri statutes were "strikingly similar in language, and identical in substance." Brief for Appellant in No. 217, October Term, 1936, p. 19; see Mobile br., p. 35.

On the other hand, the appellee in *Midland* contended that *Wichita* was "not in point herein" because it was based upon a Kansas statute and Kansas decisions "wholly unlike" Mis-

Wichita, far from being controlling, as Mobile urges, is irrelevant to the instant case.

CONCLUSION

For the foregoing reasons and those set out in our main brief, it is respectfully submitted that the judgment below should be reversed.

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souri's filed rate procedure, since Kansas required a finding as to contract rates before they could be superseded. Brief for Appellee in No. 217, Oct. Term, 1936, pp. 29–30; see our main brief, pp. 74–76; it also pointed out that *Wichita's* "general principles of constitutional government" (260 U. S. at 58) were only that a commission must follow the procedures and rules laid down by the legislature and must show its compliance with them. Brief for Appellee in No. 217, October Term, 1936, p. 30; see our main brief, pp. 76–79.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 556

FEDERAL POWER COMMISSION,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The affirmative arguments of respondent Mobile Gas Service Corporation ("Mobile") in opposition to the granting of a writ of certiorari are fully set forth in our Brief in Opposition to the Petition for Certiorari filed in No. 430 by United Gas Pipe Line Company ("United"). For brevity's sake they are not repeated here, but Mobile's position, upheld in a comprehensive and irrefutable opinion by the Court below, may be summarized as follows: Since private rate contracts were not outlawed by the passage of the Natural Gas Act, a natural gas company may not increase a rate embodied in a filed contract merely by filing a proposed increase in that rate, unless it has obtained the consent of the purchaser, or lacking that, unless the Federal Power Commission has

determined, after a hearing, that the contract rate is against the public interest. We think the arguments advanced in support of that position in our Brief in No. 436 are equally applicable to the present Petition, even though the Commission's arguments differ radically from those advanced by United, and we respectfully refer the Court to the opinion below and to that Brief for a fuller discussion. We shall confine this Brief to a discussion of the arguments advanced by the Commission.

(1) The most significant feature of the Commission's petition is that it repudiates the basic premise relied on by United. The Court will recall that in No. 436, United argues that a natural gas company is under a continuing duty or "obligation" to initiate changes in its rates from time to time under Section 4 of the Natural Gas Act (52 Stat. 822, 15 U.S.C. § 717c). The Commission, on the other hand, appears to agree with us that no such duty or obligation exists, for, in its only reference to United's argument, the Commission says in footnote No. 12 on page 10 of its Petition:

> "That Section 4(d) does not impose an *obligation* upon a gas company to initiate rate changes which might be contrary to its contract with the purchasing company is immaterial * * *."

The Commission then argues that under what it describes as "the filed rate procedure" prescribed by the Natural Gas Act it has no choice but to accept for filing a proposed increase filed by a natural gas company under Section 4(d) even though the proposed increase may violate a duly filed contract. We submit that this contention is as fallacious as that advanced by United.

(2) As we understand it, the Commission's argument runs as follows: Under Section 4(d) a natural gas company may file a proposed increase in its rates and charges, and the Commission has no choice but to accept for filing such proposed increase. Under Section 4(e) the Commission may suspend the proposed increase for a period not exceeding five months, but at the end of that period the proposed increase goes into effect. Under Section 5(a) the Commission may, after a hearing, order a decrease in the rates and charges of a natural gas company, but it may not order a decrease which would reduce the rates and charges of such company below a lawful contract rate. Therefore, the Commission argues, it is powerless to order a decrease in the rates and charges of a natural gas company which would reduce such rates and charges below a lawful contract rate.

propose a change in an existing filed rate or contract with
out due notice by filing, and under [illegible] such a file
proposed increase becomes effective unless it is found
the Commission after a hearing to be exorbitant, di
criminatory or otherwise unreasonable. The bulk of t
Petition is devoted to establishing this proposition,
which the Commission then bases its ultimate conclusio
that, therefore, no filed increase may be rejected by th
Commission in the absence of a hearing and finding
to the reasonableness of the *new* rate.

This argument begs the question. No one denies tha
when a proposed increase is *lawfully filed*, it will becom
effective, unless the new rate is found unlawful by th
Commission after a hearing under Section 4(e). An
no one denies that, if no hearing is ordered by the Com
mission, a *lawfully filed* increase may not be rejected an
will become effective automatically within thirty days
the filing. But the question here is whether a natural ga
company, having filed a contract requiring it to sell ga
at a fixed rate for a term of years, may lawfully file
proposed change in that rate and thereby set aside th
contract, without the consent of the other party to tha
contract. If it has not obtained such consent, we think i
must be clear that such a filing is unlawful *ab initio* an
must be rejected as soon as the Commission is advised o
the refusal of the purchaser to agree to the change.

There can be no doubt but that the Commission ha
power to reject a schedule of proposed increases which
was unlawfully filed. For example, Section 4(d) require
that a "notice of a proposed rate increase shall be
given by filing with the Commission . . . new
schedules stating plainly the change or changes to be made
in the schedule or schedules then in force and the time
when the change or changes will go into effect." Clearly

which did not comply with this provision. So also, we submit that the provision in the preceding sentence of 4(d) that "* * * no change shall be made by any natural-gas company in any such [filed] rate * * * or contract relating thereto, except after thirty days' notice * * * to the public" must be deemed to refer to a rate or contract which the gas company had a legal right to change. Thus, when the Commission is notified by the purchaser that it does not agree to a proposed change in a rate embodied in a contract which has been duly filed with it, the Commission is on notice that the natural gas company had no legal right to file the increase, and should therefor reject it as unlawfully filed.

This is the position taken by the Court below, and it is also precisely the point which was decided by this Court in *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48 (1922). That case dealt with an attempt to increase a contract rate without the consent of the other party, by resort to a "filed rate procedure" which is substantially identical with that embodied in the Natural Gas Act: both Acts provide that a change in a filed rate may be initiated by the public utility by filing and publishing a schedule showing the proposed change, and that an existing rate may be set aside by the Commission after a hearing and finding that the existing rate or contract is unlawful. The only difference between the two Acts is that under Section 20 of the Kansas statute (Kansas Public Utility Law, Session Laws of 1911, C. 238, p. 422 *et seq.*) a proposed change cannot become effective unless approved by the State Commission, whereas under Sections 4(d) and (e) of the Natural Gas Act the proposed change becomes effective in thirty days unless suspended and later affirmatively disapproved by the Commission after a hearing. We think this is a distinction without a difference: under both statutes a change in rates may be initiated by the utility by resort to the filing process, and under

neither can the proposed increase become effective if disapproved by the Commission. Thus, it seems to us, the Kansas statute embodies the very principles of the "filed rate procedure" on which the Federal Power Commission relies in the present proceeding.

In that case, as here, it was argued that under a section substantially equivalent to Section 4 of the Natural Gas Act, "* * * all that was needed was the filing of a schedule of changed rates and the consent of the Commission, and that no finding was required" (260 U. S. at 56), as it was in the sections analogous to Section 5(a) of the Natural Gas Act. The Chief Justice commented: "This construction of Section 20 [the equivalent of 4] is doubtless correct, but it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates." (260 U. S. at 56). After quoting a decision of the Supreme Court of Kansas to the effect that "'The passage of the [Kansas] act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon'" (260 U. S. at 58) the Chief Justice concluded that where the legislature had delegated power to set aside contracts to an administrative agency to be exercised after a hearing and finding that the existing contract was unreasonable, that procedure had to be followed.*

In opposition to this proposition, the Commission argues at page 9 in footnote No. 9 that "There is no question * * * as to the constitutionality of the filed rate procedure under which, without prior hearing, rates may become effective and vary private contract rights.", citing

*The attempt at page 16 of the Petition to distinguish this case on the basis of the Illinois Supreme Court decision in *Antioch Milling Co. v. Public Service Co. of Northern Illinois*, Ill. Sup. Ct. (Docket No. 33254, Agenda 34—Sept. 1954), is baseless. No contract was involved in the *Antioch Milling* case.

Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109, 112-113; *Sutter Butte Canal Co. v. Railroad Commission of California*, 279 U. S. 125, 137-138; and *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 375-377. The *Sutter Butte* and *Union Dry Goods* cases do not support the proposition for which they are cited at all. On the contrary, they support our basic contention that the proper procedure for abrogating a rate contract is to hold a hearing as to its reasonableness. For in each case, the State Commission had invalidated existing rate contracts after determining upon investigation and hearing, that the contracts were discriminatory, and this Court held that that procedure was not an unconstitutional impairment of contract rights—a proposition with which we are in entire agreement.

We concede that in the *Midland Realty* case (300 U. S. 109 (1937)) this Court sustained the validity of a filed rate increase even though it had been filed in violation of an alleged contract. But, as this Court was at pains to point out, it was bound by the construction which the state courts of Missouri had placed upon the Missouri statute, and that construction was that under the Missouri court's view of "'our own peculiar constitutional provision'" rate contracts were unlawful in Missouri (*State ex rel. City of Sedalia v. Public Service Commission*, 275 Mo. 201 at 212, 204 S. W. 497 at 499 (1918)). Thus that case has no bearing on the case at bar unless it be first held that the Natural Gas Act, like the Missouri statute, has automatically outlawed all rate contracts.

(3) This brings us back to the real question presented by this proceeding, which, as we point out in our Brief in Opposition in No. 436, is whether the passage of the Natural Gas Act automatically abrogated the right to enter into private rate contracts, or whether it expressly

delegated to the Federal Power Commission power to abrogate such contracts after a hearing and finding that the public interest so requires. Of course, if the Gas Act automatically abrogated rate contracts, a duly filed rate becomes the lawful rate regardless of the existence of an invalidated "contract", as it did in the *Midland Realty* case, and the decision below was erroneous. On the other hand, if the Act merely delegates the power to abrogate contracts to the Federal Power Commission under Section 5(a), it is obvious that the mere filing of a proposed increase can no more "* * * accomplish the result of abrogating contract rates" than did the filing passed upon by this Court in the *Wichita* case (260 U. S. at 56).

On this issue the Commission's petition throws very little light. Its principal argument seems to be that "* * * apparently influenced by its unwarranted feeling that the Commission's result was inequitable to Mobile, the court has accorded to the United-Mobile contract an unmerited dignity, and erroneously characterized as 'radical' a procedure which has been consistently followed by the Commission in its administration of the Natural Gas Act as well as the Federal Power Act, and is also a recognized technique adopted by many states in their public utility regulatory statutes" (Pet. 6-7).

This is novel doctrine. Apparently the Commission takes the view that since it is well established that rate contracts must yield when found to contravene the public interest, rate contracts in general have lost so much "dignity" that they no longer merit serious consideration even when not found to contravene the public interest. Surely it has not become "erroneous" to characterize as "radical" a procedural device which permits one party to a valid contract to abrogate it at will without the consent of the other party or without even a hearing and finding that the *contract*, not a proposed change in the

contract, is contrary to the public interest. Nor does the fact that the Commission may have erroneously failed to comply with the procedure prescribed by Congress as a prerequisite to the abrogation of contracts in other cases than the present seem to present a valid ground for holding that these procedures need never be observed.

So far as the suggestion that the Commission's construction represents a "* * * recognized technique adopted by many states" is concerned, we respectfully refer to the cases cited at pages 9 and 10 of our Brief in Opposition in No. 436. It seems to us that those cases clearly show that in many States and in all Federal courts, statutes similar to the Natural Gas Act are consistently construed, as was that Act itself both by the Court of Appeals for the Tenth Circuit in the *Colorado Interstate Gas Co.* case (142 F. 2d 943 (1944), affirmed 324 U. S. 581 (1945)) and by the Court below in the instant case (App. A to Pet., 215 F. 2d 883 (1954)), as not automatically abrogating rate contracts. We find nothing in the Commission's petition which supports a different construction.*

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* The Commission also argues in footnote No. 8 of its petition that "* * * the scheme evolved by the court below would, if adhered to literally, preclude all rate increases" because Section 5(a) provides that after a contract has been rejected the Commission may not order "'any increase in any rate * * * unless such increase is in accordance with a new schedule filed by such natural gas company.'" As we read this provision, it simply means that after an existing contract has been found unreasonable and discriminatory and the Commission indicates that a higher rate is desirable, it will call upon the company to propose a new rate, thus placing upon the company the initial burden of proposing rates—and more importantly, from the standpoint of the present controversy, giving the parties to the original contract an opportunity to renegotiate a new contract in lieu of the one which has been found unreasonable by the Commission. Thus there is nothing here which prevents rate increases after an existing contract rate has been found unlawful.

(4) The Commission asserts at pages 19 and 20 of the petition that: "The result below is also at odds with the views expressed by the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (C.A. 5, No. 15034, decided November 24, 1954)." The *Tyler* opinion is reprinted in the Appendix to Mobile's Brief in Opposition in No. 436). It is worthy of note that the *Tyler* case is the only Federal case cited in either Petition which even suggests that a contract may be abrogated unilaterally by the filing procedure under the Natural Gas Act. But, as noted at pages 11 through 13 of our Brief in Opposition in No. 436, the statements relied on by counsel are mere *dicta*, as the Fifth Circuit itself expressly recognized when it stated that its decision was not in conflict with the decision here sought to be reviewed (App. to Br. in Opp. in No. 436 at pp. 9a-10a).

The Commission insists also that the decision of the Court below in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (1953), is in conflict "at least in principle" with its own decision in the instant case. We suggest that on the contrary a comparison of the two cases affords a persuasive illustration of the error of the Commission's contentions regarding the right of a gas company to file rate increases under Section 4(d) in violation of an existing contract. In the *Mississippi River* case, the Commission had rejected the gas company's new rate schedules on the ground that it appeared from the supporting documents filed with the schedules that about one-third of the proposed increases were unwarranted because the events purporting to justify the increases (an expected rise in the price of gas) had not yet occurred. The Court quite properly held that under Section 4(e) the Commission had no power to reject a

filed schedule on the ground that the proposed *new* rates were unjustified, without a hearing, for that section expressly requires a hearing and finding before such action can be taken. But in the present instance we are dealing with a situation where the filing itself was unlawful because it violated a contract duly filed with the Federal Power Commission. No question as to the reasonableness of the *new* rates is involved. Thus the two cases are clearly distinguishable, as the Court that decided both of them itself noted (App. A to Pet. 44, 215 F. 2d at 891).

(5) The Commission devotes some space to an attempt to argue that a decision which compels Mobile to pay 14.5¢ to United for gas which it is obligated under its contract with Ideal to resell at 12¢ is not inequitable, because "* * * Mobile has not made any effort to eliminate, or even alleviate, the 'squeeze' by seeking an increase in its rate to Ideal either before the state regulatory agency or otherwise * * *." (Pet. 26) The reasons for Mobile's failure to act in this respect are, of course, that Mobile believes that a valid contract should be honored until modified by agreement or set aside after a finding that it is against the public interest, and that in any event, under Alabama law its contract with Ideal is binding and cannot be set aside by the Alabama Commission. *See Birmingham Electric Co. v. Alabama Public Service Commission*, 233 Ala. 675, 173 So. 19 (1937). Thus, Mobile is indeed in a "squeeze".* Under the Federal regulatory statute as

* At page 20 of the Petition the Commission asserts that this "squeeze" "* * * will persist should the Commission approve the proposed increase as it concededly has the power to do." We do not understand the origin of this alleged "concession". Under the decision below and our own contentions, the Commission has no power to approve the proposed increase until and unless it finds that the existing contract is against the public interest. We are quite confident that in any hearing directed to that issue the existing contract will be found reasonable and the "squeeze" eliminated.

CONCLUSION

The petition fails to set forth any grounds for review by this Court and should be denied.

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